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may arise from the obscure wording of this enactment, which differs from the statute 21 *Jac.* 1, c. 19, s. 2, by the provisions of which the act of bankruptcy had relation back to the day of the arrest; but it is nevertheless consistent with the enactment, that the relation should take effect, and it may be so read by suspending the sense, and considering each provision to be a member of the same sentence. In the ordinary construction of the clause, there would seem to be a distinction between lying in prison and an escape. But there is no reason in principle for such a distinction, the object of a relation being to prevent the intermediate disposal of property, which is alike applicable to either case. The absurdity of a contrary construction may be easily illustrated. Suppose a trader to be arrested, and to lie in prison for twenty-one days: then, according to that construction, he would be a bankrupt from the last day of his imprisonment; but should he lie in prison for a longer period, say twenty-two days, and then escape, the act of bankruptcy would have relation to the day of the arrest. A construction involving such an absurdity should be avoided, particularly where, by suspending the sense to the last part of the sentence, the words "from the time of such arrest," may be rendered applicable to every member of the sentence, the intention of the legislature may be effectuated, and all absurdities may be avoided. By the provisions of the old act (a), there was no relation in the event of an escape. It would be singular to take from the one case such a provision, and to apply it to another alternative, to which before no such enactment was applicable. That could not be the intention of the Legislature; but, on the contrary, it is clear that the object of a relation was to prevent an intermediate disposal of property, a provision highly beneficial for the prevention of fraud. This construction is favoured by the proviso of the sec-

(a) 21 *Jac.* 1, c. 19, s. 2.

the late act of Parliament, were deemed not sufficient to make the party a bankrupt, by relation, from the time of the first arrest, without the introduction of express words for that purpose; and, therefore, the Legislature, by express and positive enactment, in the 21 *Jac.* 1, c. 19, s. 2, made the party, after lying in prison for two months for debt, a bankrupt from the first arrest. Then, supposing this to be so, and that there is no relation, the act of bankruptcy is inchoate and in progress only until the party has lain in prison twenty-one days, and until the expiration of that time no act of bankruptcy can be said to be complete.

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Assuming that no act of bankruptcy was completed till the expiration of the 24th of *July*, at which time the period of remaining in prison would have expired, the question will be, whether the plaintiff is entitled to retain his verdict, and to what extent. That will depend upon the construction of the 6th of his present Majesty, chap. 16, sect. 108. That section enacts, that no creditor, having security for his debt, shall receive upon any such security more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of, or any lien upon, any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment *obtained by default, confession, or nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors. If a *feri facias* be sued out on a judgment obtained *after a verdict*, and the sheriff levy by a seizure before the bankruptcy, the execution-creditor will, in such case, be, under the former branch of the statute, entitled to the fruits of his execution (a). But, under what circumstances an execution sued out on a

(a) See *Cole v. Davies*, 1 Lord Raym 724.

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already referred, which will be found to bear out that doctrine of the Chief Justice.

But it is unnecessary to consider what would have been the rights of the present plaintiff, in case the money, the proceeds of the execution, had remained in the hands of the Sheriff after a levy and a sale by his own proper officer, because the sales on the 23rd and 24th of *July* having been made by *an agent of the plaintiff*, we must consider those sales of the same legal effect as if they had been made by the plaintiff himself, and of consequence that the money actually received on those days by the clerk of the plaintiff's attorney (which attorney entered into an indemnity), was received by the plaintiff himself.

In the case of *De Moranda v. Dunkin* (a), where the Sheriff appointed a special bailiff at the plaintiff's request, the Court held, that the latter could not rule the Sheriff to return the writ; and *Buller*, Justice, said, it had been repeatedly held, that, if a special bailiff be appointed on the nomination of the plaintiff, the latter must take the consequence of the acts of the former; the Court has considered them as the acts of the plaintiff himself. The same point was determined in *Hamilton v. Dalziel* (b). But in *Taylor v. Richardson* (c), though the Sheriff had appointed a special bailiff to arrest the defendant at the plaintiff's request, the Court held the Sheriff responsible after the arrest made, and Lord *Kenyon* said this was very distinguishable from the former cases, which at that time were brought under the consideration of the Court. The receipt of the monies by the agent of the execution-creditor at the sale, would operate as a discharge to the Sheriff from any demand by the creditor in respect of that money. And as to the money to be derived by the sales on the 23rd and 24th *July*, but which was not then in fact re-

(a) 4 Term Rep. 119.

(b) 4 Term Rep. 121, n. (a).

(c) 8 Term Rep. 505.

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Pallister v. Pallister, it was held that the Sheriff was discharged by the plaintiff appointing a special bailiff and agent to manage the sale under a writ of *fi. fa.* (a).

For these reasons, therefore, we are of opinion that the verdict ought to be reduced to the sum of 66*l.* 2*s.*, the amount of the goods sold on the 25th day of *July*, after *Cartmell* became a bankrupt. With respect to these goods, the plaintiff is entitled to retain his verdict; and the plaintiff's right to the latter sum is agreeable to the construction put upon this section of the sixth of his present Majesty in the case of *Notley v. Buck* (b).

(a) 1 Chit. Rep. 614, n.

(b) This case involves the construction of two very important sections of the late bankrupt act. With respect to the fifth section, this is the first case in which the question, whether the act of bankruptcy by lying in prison has relation to the time of the arrest, has been decided; for, although it occurred at *Nisi Prius*, in the case of *Tucker v. Barron*, 1 M. & M. 137, S. C. 3 C. & P. 85, Lord Tenterden declined giving any opinion upon the subject. Two points are upon this section resolved: the first, that the act of bankruptcy has no relation; and the second, that the time of lying in prison is to be reckoned inclusively; as, for instance, where the arrest is on the 4th *July*, the act of bankruptcy will be complete on the 24th of the same month, so as to over-reach an act done on the 25th. This latter construction accords with the rule applicable to the stat. 21 Jac. I. c. 19, s. 2, which enacted that a trader lying in prison two months after an arrest for debt, should be adjudged a bankrupt from the time of his first ar-

rest, which, it was holden in the case of *Glassington v. Rawlins*, 3 East, 407, S. C. 4 Esp. 224, included the day of the arrest.

With respect to the 108th section, this seems to complete the class of cases in which that obscure and difficult clause has come under the consideration of the Court. Of the difficulty of that construction we have the best authority, for, in the case of *Taylor v. Taylor*, 8 D. & R. 159; S. C. 5 B. & C. 392, the Court of King's Bench, upon that ground, refused to interfere upon a summary application, to set aside an execution issued upon a judgment obtained by *nil dicit*. Impressed with this difficulty, the Court of King's Bench, in the case of *Wymer v. Kemble*, 6 B. & C. 479, attempted to put a construction upon the clause so as to give effect to the enactment, and at the same time to avoid the manifest injustice which would ensue from a more liberal construction, by which, at any remote period, the assignees would be entitled to recover money levied

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hands of the Sheriff. That point was resolved in the case of *Morland v. Pellatt*, 8 B. & C. 722. In that case judgment was entered up on a warrant of attorney, and a *fi. fa.* issued, returnable on the 2nd *May*: before the return of the writ, the goods were sold, and the money received by the Sheriff, but not paid over by him to the plaintiff in execution until the 11th *May*, an act of bankruptcy having been committed on the 5th of the same month. The Court held, that after sale or payment of the money to the Sheriff he became a debtor to the plaintiff in execution, whereby the original debt was extinguished, so that the plaintiff would no longer be a creditor having security for his debt. It is observable, that, in that case, the act of bankruptcy was committed after the return of the writ, and that Mr. Justice *Bayley* declined to express an opinion upon the effect of this section in a case where the act of bankruptcy might occur between the sale by the Sheriff and the return of the writ. That point arose in the case of *Higgins v. M'Adam*, and, after great deliberation, was determined to be inoperative to deprive the plaintiff in execution of his right to the proceeds of the sale. Upon the day upon which this judgment was delivered in the Court of *Exchequer*, the case of *Fox v. Burbridge* was heard in the Court of *King's Bench*, in which the same point arose.

In that case the plaintiff obtained

a judgment by *nil dicit*, and, under a writ of *fi. fa.*, caused the goods of the defendant to be seized and sold. Before the return of the writ, but after the money had been paid to the Sheriff, an act of bankruptcy was committed, upon which a commission issued. The plaintiff in execution obtained a rule, calling upon the Sheriff, the defendant, and the assignees, to shew cause why the proceeds of the sale should not be paid over to him. *Follett*, who appeared for the plaintiff, contended that he was entitled to the money upon the authority of *Morland v. Pellatt*, but that, at all events, the Court would not direct the Sheriff to pay the money to the assignees, inasmuch as the bankruptcy might be disputed. *Ex parte Washbourn's Assignees*, 8 B. & C. 444. *Holroyd*, who appeared for the assignees, endeavoured to distinguish the case from that of *Morland v. Pellatt*, by the fact that the act of bankruptcy was committed before the return of the writ, and contended that, as against the Sheriff, the plaintiff had no right to the money until the writ was returnable. Lord *Tenterden* was of opinion that that circumstance afforded no distinction between this and the case of *Morland v. Pellatt*, and directed that the rule should be made absolute for the Sheriff to pay the money to the plaintiff in execution, the Sheriff being allowed his costs incurred by the application.

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DOE *ex dem.* Mayor and Burgesses of STAFFORD and
Another, *v.* TOOTH.

THIS was an action of ejectment, tried before *Gaselee, J.*, at the *Summer Assizes*, 1828, for the county of *Stafford*, in which the learned Judge directed the Jury to find a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit.

A member of a corporation is not a competent witness to sustain the claim of the corporation, even though he release his interest in the subject matter of the suit.

The declaration contained counts upon two demises, the one by the Mayor and Burgesses of *Stafford*, and the other by *John Goodwin*. To support the former demise, *Tildesley*, a burgess of the corporation, was called to prove the service of a notice to quit, and, upon an objection being taken to his competency, executed a release, by which he released to the corporation "all his right, title and interest, which, as one of the burgesses of the borough of *Stafford*, he then had, or ever had, should or might have, in the house, land and premises (the subject of the ejectment); so that neither he, his heirs or assigns, or any person or persons in trust for him, either should or would, could or might, by any means whatsoever, thereafter have, claim, challenge, or demand any right, title, or interest, of, in, to, or out of the same; and also all his right, title, and interest, of and in all and every sum or sums of money, debt, claim, or demand which he then had, or ever had, or ever might have, as such burgess, for or in respect of the same." Another witness, of the name of *Budden*, was called to prove a disclaimer by the defendant of *Goodwin's* title, in order to support the second demise, he likewise was a burgess of the corporation, and executed a similar release. Notwithstanding these releases, the competency of these witnesses was objected to, and other objections to the maintenance of the action were raised at the trial, upon which, however, no question subsequently arose.

4 L. & C. 54
1 L. & J. 50

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In *Michaelmas* Term, *Campbell* obtained a rule, calling upon the lessors of the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered: and now—

Russell, Serjeant, and *Williams, E. V.*, shewed cause.—It is unnecessary to discuss the competency of *Budden*, because if *Tildesley* was a competent witness, the plaintiff is entitled to retain his verdict, for the title of the corporation was then complete. Without a release he was a competent witness. The first case upon this subject is to be found in *Viner's Abridgment "Evidence,"* (G. 2) (a), in which *Atkins, J.*, allowed one of the corporation to be a witness in an action brought by the corporation of the weavers of *Norwich*, for a penalty against a weaver for working at his trade in harvest time, although one moiety of the penalty was due to the corporation. The case of the Mayor and Commonalty of *London* (b), and that of the city of *London* concerning water bailage (c), are to the same effect. In the former it was ruled by the whole Court, and in the latter, by three judges, that freemen (members of the corporation) might be witnesses in support of the claim, because their interest would be inconsiderable, as the tolls would be received for the benefit of the whole corporation (d). It is true that the authority of these cases has

(a) 12 Vin. 15.

(b) 2 Lev. 231.

(c) 1 Vent. 351; *Res v. Carpenter*, 2 Show. 47.

(d) In the former of these cases, the Chief Justice *Scroggs* said, that it ought not to be a general rule, that members of corporations shall be admitted or deemed to be witnesses in actions for or against their corporations: but every case stands upon its own particular circum-

stances, viz. whether the interest be so considerable as by presumption to produce partiality or not. In the latter case, although three Judges, *Scroggs*, *Dolben*, and *Raymond*, were of opinion that the witnesses were competent, *Jones* differed, and a bill of exceptions was tendered, but the plaintiff's counsel withdrew the witnesses and offered other evidence, upon which the defendant had a verdict.

been doubted (a), and that in some instances members of corporations have been held to be incompetent. Thus, in the case of *Burton v. Hinde* (b), freemen were held to be incompetent, but the interest in that case was tangible, and clearly such as would disqualify, the question being in respect of the sufficiency of common. From the doubt which has been entertained in that respect, and from the difficulty of ascertaining the quantum of interest that would disqualify, the practice of disfranchisement has probably obtained. But that mode is not the only one by which an interest may be defeated, for it is stated in a book of great authority to be sufficient if the witness release his right to the corporation (c). Now, that course has been pursued in this case, and the witness having by that means divested himself of all interest in the subject matter of the suit, the only remaining objection that can arise, is in respect of his

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(a) B. N. P. 290. In the case of *Dodnoll v. Nott*, 2 Vern. 317, the Court said, "the objection of an existing interest though never so small has always prevailed, and it was so resolved upon great debate in the case of the City of London, concerning water bailage."

(b) 5 T. R. 174.

(c) 2 Stark. Ev. 427. The case cited by the learned author as an authority for this position, is that of *Enfield v. Hills*, Sir T. Jones, 116; 2 Lev. 236, which does not support it to its full extent. That was an action for a false return to a *mandamus*, to prove the truth of which several freemen were tendered as witnesses. The evidence of these witnesses was objected to, not because they had a direct interest in the suit or subject matter of it, but because by a bye-law the charges of suit were to be defrayed

by the corporation, to which it was answered that the *defendant* had released the mayor, freemen, commonalty, and all others the freemen, of all advantages, contributions, and demands, which he might have against them by virtue of this bye-law, or any other order, *aut alio modo quocunque*. Notwithstanding this release, the witnesses were considered to be incompetent by *Rainsford* and *Twisden*, *contra*, Jones, upon which a bill of exceptions was tendered; and upon argument it was held, that the refusal of the witnesses was error; for, *be it as it will in other respects*, by the release of the *defendant*, all the advantages he can have against the citizens for these charges upon the bye-law is discharged. And the whole Court held that the witnesses should have been admitted.

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ultimate liability as a member of the corporation to a portion of the costs, in the event of a failure. But that is not such an interest as will disqualify a witness; for, being a party to the suit in his corporate capacity merely, he is not individually liable for costs. Upon this principle, in an action against the Governors of the *Foundling Hospital* for the amount of work done by the plaintiff, Lord *Kenny* admitted several of the governors to prove the badness and insufficiency of the work. *Weller v. The Governors of the Foundling Hospital* (a).

Campbell, contra, after arguing that the release applied to a specific claim merely, but not to any interest which the witness might have in the general funds of the corporation, over which they had the absolute control, and which might, in the event of a failure, be reduced by the amount of the costs, was stopped by the Court.

GARROW, B.—This case depends entirely upon the question whether the evidence of *Tildesley* was that of a person who was a competent witness, which question is disposed of by a simple statement of facts. If the corporation obtain a verdict, they will thereby be entitled to certain property, which, added to the general stock of the corporation, will become a fund distributable amongst the members of the corporation, of which the witness is one. In that view of the case, therefore, he would clearly be disqualified, because his evidence tends to increase a fund in which he has a direct interest. But it may be said he has released all claim to this specific property. It must be admitted, without reference to this property, that he is interested in the general funds of the corporation, and if that be so, there is a second mode in which that interest may be affected, *viz.* by decreasing that general fund by

(a) 1 P. N. P. 153.

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of the *Foundling Hospital*, the witnesses were admitted because they were mere trustees, and had not the least personal interest. That is not the case here, and wherever it is once admitted that a witness has an actual and direct interest in a fund which may be affected by the verdict, he is thereby rendered incompetent.

Rule absolute.

YOUNG v. DOWLMAN.

Where no money has been advanced by the client, the Court will not allow costs to an individual conducting the cause, who has been struck off the roll of the Courts of *King's Bench* and *Common Pleas*, and, by omitting to take out his certificate as such, is incapacitated from practising as a solicitor of the Court of Chancery.

THE plaintiff in this case discontinued his action. On the taxation of costs, it was objected, on the part of the plaintiff, that the person acting as attorney for the defendant was not an attorney of the Court, having been struck off the roll of attorneys in the Courts of *King's Bench* and *Common Pleas*, and, having for some years omitted to take out his certificate as a solicitor of the Court of Chancery, although he had subsequently taken out a certificate without obtaining leave from the Court for that purpose. No advances of money having been made by the defendant, the Master, under the circumstances, refused to allow the costs; upon which

Humfrey obtained a rule to shew cause why the Master should not be directed to review his taxation; against which

Patterson shewed case. The question is, whether this person, not being an attorney of the Court of *King's Bench*, or of the *Common Pleas*, or a solicitor in Chancery, having ceased to take out his certificate as such, is entitled to recover his costs in this case. It is not a question between the plaintiff and defendant, but merely as respects the party assuming the character of an attorney, for he has no

1. King's Bench. 11.

remedy against his client, who cannot therefore be damaged by withholding these costs. This circumstance distinguishes this case from that of *Reader v. Bloom* (a), which may be relied upon in support of the application; for the judgment of the Chief Justice in that case proceeds upon the assumption that advances had been made. If any money had been paid by the defendant to this person, it would be impossible to contend that the client ought not to be indemnified, but this is an application for costs which cannot be recovered against the client.

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Humfrey, contra.—According to the practice both of the *King's Bench* and *Common Pleas*, this rule ought to be made absolute. That of the latter Court was settled in the case of *Reader v. Bloom*, in which the same arguments were resorted to as upon the present occasion, but the Court, notwithstanding, refused the rule which sought to deprive the party of his costs: and Mr. Justice *Park* said (b): "The meaning of the statute is, that, if a non-attorney sues for extra costs, he shall not recover them against his client." In *Tidd's Practice*, p. 77, it is laid down, that "it is no ground of objection to bail, 2 *Chit. Rep.* 98, nor for cancelling a bail-bond, 1 *D. & R.* 215, or setting aside proceedings, that the attorney by whom the bail was put in, or who sued out the writ, had neglected to take out his certificate: and the circumstance of the plaintiff's cause having been conducted by an attorney who has not obtained his certificate, does not deprive the plaintiff of his right to full costs against the defendant."

GARROW, B.—I should be sorry, if, upon the present occasion, we were called upon to adopt a rule different from that which has been acted upon by the Courts of *King's Bench* and *Common Pleas*; but, in discharging this

(a) 10 B. Moore, 261; S. C. 3 Bingham, 9.

(b) 3 Bingham, 11.

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rule, we shall not infringe upon the decisions to which allusion has been made, because the case is, in its circumstances, altogether distinguishable from those which have been cited. I think, that, in this case, the Master has exercised a sound discretion. The party making this application has been struck off the roll of attorneys of two of the common-law Courts of *Westminster Hall*; and although he still remains upon the roll of the Court of *Chancery* as a solicitor, yet, having omitted to take out his certificate, he is not entitled to practise as such, although he has subsequently, improperly, and surreptitiously obtained a certificate without procuring leave from the Court for that purpose. There can be no doubt, that, as between the plaintiff and the defendant, the latter is entitled to receive from the plaintiff all the costs which he may have incurred, and, if it had happened that this person, before he undertook the business, had required an advance of money, the Court would not have interfered to prevent the taxation of costs to that extent, because they would have been unwilling to disturb the rights of his client. But the question in this case is not between the client and his opponent, but whether, where acts of Parliament require certain things to be done, in order to capacitate persons to practise as attorneys, and to recover their fees, and those requisites are not complied with, the Court will, notwithstanding, lend their assistance to enable the offending party to recover his costs. To do this, would, in my opinion, work an injury to suitors. If costs were allowed to this party, why may they not be allowed to any third person who never was an attorney. It seems to me that it would be discreditable to entertain such a doctrine, and that, in refusing the allowance of costs, the Master has exercised a very sound discretion.

HULLOCK, B.—I am entirely of the same opinion, and think that, if this rule were not to be discharged, this

Court would be holding out a premium to individuals who have been struck off the rolls of other Courts to practise in this. This is not a case in which the plaintiff is to lose or be deprived of his costs: if he had made any advances of money, he had an opportunity of saying so; but, the question is, whether a person, who is admitted to be incapable of practising in the Courts of *King's Bench* and *Common Pleas*, and, in point of law, is incompetent to practise in the Court of *Chancery*, is entitled to call upon this Court, to lend their assistance to enable him to recover his costs. After the interval of twelve months, an attorney is not entitled to take out his certificate as of course, but must first apply to the Court upon an affidavit of the circumstances which have occasioned the omission. Can any one doubt, that, if this person had applied to the Court of *Chancery*, stating the circumstances of his case, that Court would have refused his application? I own, that, if the case cited had been precisely analogous to this, my opinion would be unchanged, for I cannot think that any Court should countenance an application like this. Such a doctrine, would, in my opinion, be fraught with the greatest injustice, and be highly derogatory to the dignity of the Court.

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VAUGHAN, B.—I confess that my mind has in some measure fluctuated during the discussion of this case, in consequence of the decision in the Court of *Common Pleas*, to which allusion has been made. Upon examination, however, it will be found that the Chief Justice, in his judgment, proceeds upon an assumption that the plaintiff had at the outset made advances to the party who conducted his cause, which circumstance distinguishes that case from the present, for here no advances have been made; and the question resolves itself into this simple point, whether this Court will lend itself to put money into the pocket of an individual, who, not being an attorney of the Courts of

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King's Bench and Common Pleas, or legally entitled to practise as a solicitor of the Court of *Chancery*, has against his own client no remedy. If this had been an application on the behalf of the defendant, I might have entertained a different opinion; but that is not the case here, for there is no pretence for assuming that the application is on his behalf, and, that being so, it is a mere struggle by this individual to recover those fees which are only recoverable by a regular attorney. Although the statement of the case of *Reader v. Bloom* does seem to militate against discharging this rule, yet, when the judgment of the Chief Justice is referred to, the principle of that decision is apparent, viz. that the Courts will not interfere with the rights of the suitor; and, under the circumstances of this case, upon that distinction, I think that the rule should be discharged.

Rule discharged.

ROGERS v. PRICE, Executor.

An executor who has assets sufficient for that purpose, is liable, upon an implied promise, to pay for a funeral, suitable to the degree of his testator, furnished by the directions of a third person.

ASSUMPSIT by the plaintiff against the defendant, executor of *Davies*, for work and labour as an undertaker and materials furnished for the funeral of *Davies*.
Plea—*Non assumpsit*.

At the trial, which took place before *Gaselee, J.*, at the *Hereford Summer Assizes*, 1828, it appeared that the testator died in *Wales*, at the house of his brother, who, thereupon, sent for the plaintiff, an undertaker residing at a distance. The plaintiff afterwards furnished the funeral, and the brother of the deceased attended it as chief mourner. It was admitted that the funeral was suitable to the degree of the deceased. Upon these facts, there being no evidence of any contract made by the defendant, or that he knew of the funeral until after it had taken place: the learned Judge was of opinion that the plaintiff was not entitled to

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recover, and directed a nonsuit, with leave to enter a verdict for the plaintiff for 30*l.*, if this Court should think him entitled to recover.

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In *Michaelmas* Term last, *Russell*, Serjeant, in pursuance of this leave, obtained a rule calling upon the defendant to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for 30*l.*; and in support of the application cited the case of *Tugwell v. Heyman* (a).

J. M. W. 350.
1 B. & A. 210.
3 Aug. 24. 848.

Maule, shewed cause.—The case of *Tugwell v. Heyman* is not to the full extent applicable to the present. In that case there was no evidence of any orders having been given by any one, but here there was reasonable proof, from which the Jury could not fail to infer that the brother of the deceased had set the plaintiff in motion. Admitting, therefore, that that case is law, it is inapplicable to this, for here the brother, who gave the orders, is liable to the plaintiff in respect of them. But that case cannot, upon principle or authority, be supported. In the case of *Ashton v. Sheerman* (b), *Holt*, C. J., said, “If *A.* employs *B.* to work for *C.*, *A.* is liable to pay for it; an executor is not liable to pay for funeral expenses unless he contracts for them.” The burial of the dead is a matter purely of ecclesiastical cognizance, and one with which the Courts of law cannot interfere. Upon this ground, in the case of *Rex v. Coleridge* (c), the Court of *King’s Bench* refused a *mandamus* to bury a corpse in an iron coffin, and Mr. Justice *Holroyd* said, the burial of the *cadaver* (that is, *caro data vermibus*) is *nullius in bonis*, and belongs to ecclesiastical cognizance. It cannot, therefore, be said, that the common-law recognizes any specific mode of burying the dead, so as to raise an implied promise on be-

(a) 3 Campb. 298.

(b) Holt, 309.

(c) 2 B. & A. 806.

contract made by his testator; but it does not follow, because he may be reimbursed out of the estate of his testator, that he is therefore liable, as executor, for funeral expenses. Had he been sued upon an express promise, a plea of *plene administravit* would be no answer, which shews clearly that he is not liable as executor. The mere description of an executor is immaterial, and may be rejected; but it is otherwise where the liability is alleged to have accrued in that character. An executor cannot be charged as such for any demand which would make him personally liable. *Rose v. Bowler* (a). But, if the defendant be liable as executor, and the plaintiff can only recover against him in that character upon this declaration, there was no evidence of his being executor, and upon that ground the nonsuit must stand. As, in an action of trover, where the title accrues after the death of the testator, the character of the executor must be proved; so, here, the right of action being in respect of a liability since the death, that character is not admitted by the plea of *non assumpsit*, but must be proved before the liability of the defendant in respect of that character can arise.

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Russell, Serjeant, and *Evans*, *John*, in support of the rule. —The simple question in this case is, whether an executor is not bound to pay for the funeral expenses of his testator, in a case where he has assets, and, by admission, the party has been buried in a manner suitable to his degree. Such a liability will be found to exist in legal principle, in decided cases, and to be founded both on expediency and on decency. It matters not by whom the undertaker is employed, for the party setting him in motion is not liable, or at least the executor is, provided the undertaker elect to sue him as such. The liability of the executor arises from the duty of an executor to bury the deceased, from which duty the law

(a) 1 II. Bl. 108.

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implies a promise, provided he has assets for that purpose. By the form of this record, the defendant admits that he is executor and has assets, and the question is simply whether as executor he is liable to the action. The case of *Tagwell v. Heyman* cannot be distinguished from this, but its authority is impugned. In that case Lord *Ellenborough* said, "it is allowed that the funeral was conducted in a manner suitable to the testator's degree and circumstances, and that the plaintiff's charge is fair and reasonable. The defendants do not deny that they have assets. Then will the law imply a promise on their part to satisfy this demand? It was their duty to see that the deceased was decently interred; and the law allows them to defray the reasonable expenses of so doing before all other debts and charges. It is not pretended that they ordered any one else to furnish the funeral, and the dead body could not remain on the surface of the earth. It became necessary that some one should see it consigned to the grave, and I think the executors, having sufficient assets, are liable for the expense thus incurred." But that case does not stand alone as an authority upon this subject. In the case of *Arlot v. Churchland* (a), an administrator brought an action for false imprisonment against an undertaker who had arrested him for the amount of his bill for furnishing the funeral of his intestate, under the following circumstances: the deceased, who was a man of very eccentric habits, had let the greater part of his house, reserving for himself merely a small room; during his illness a surgeon was called in, who sent for a solicitor, who, upon the death of the intestate, employed the plaintiff; for some months no next of kin were discovered, but, upon the defendant's eventually taking out administration, the plaintiff arrested him, but subsequently abandoned his action. Under these circumstances, *Best*, C. J., was of opinion

(a) Lond. Sitt. M. T. C. P. 1828.

that the original action was well brought, and that the undertaker might have recovered. But also upon principle, the case of *Tugwell v. Heyman* is supported. It is the clear duty of an executor to bury the deceased, and this duty he may perform before he obtain probate of the will (a). Such being the duty of an executor, a legal obligation arises out of that duty, and a responsibility which dispenses with either a promise or order from him; and where that duty exists, a liability will be implied by law, capable of being rebutted by the single fact that he has no assets for the purpose. And this is not the only instance in which a liability arises out of a duty to be performed. Parish officers are bound to provide for and take care of casual poor, and in respect of that duty are liable to reimburse the expenses of one who, not being a parish officer, takes care of persons coming within that description. *Simmons v. Wilmot* (b). Between a moral and a legal obligation, there is a main distinction. Although the former is a good consideration for an express promise, it will not raise an implied promise in law, *Atkins v. Banwell* (c); but from the latter, a liability is inferred by law. In the case of *Wennall v. Adney*, Lord Alvanley said (d), "I have no doubt whatever that parish officers are bound to assist where such accidents as these take place, and—that the law will so far raise an implied contract against them, as to enable any person who affords that immediate assistance which the necessity of the case usually requires, to recover against them the amount of the money expended." So, a father who abandons his children is responsible to one who maintains and supports them; even in the case of bastard children, if the father has adopted them as his own, *Hesketh v. Gowing* (e). And, upon the same principle, a husband who turns his wife out of doors, sends her forth

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(a) Toller, 24.

(d) 3 B. & P. 247.

(b) 3 Esp. 91.

(e) 5 Esp. 131.

(c) 2 East, 505.

would have found for the plaintiff, and that therefore this rule should be made absolute. *Exch. of Pl*
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HULLOCK, B.—I concur in thinking that, under the circumstances detailed in this case, the defendant is liable, and that therefore this rule should be made absolute. The argument on the part of the defendant has taken a very wide and extended range, and embraced a variety of topics, many of which are of considerable difficulty, but upon which it is unnecessary in this case to express any opinion. The question is, whether an executor, (which, upon this record, I assume the defendant to be), with assets, is answerable in point of law for the funeral expenses of his testator, in the absence of evidence to charge any other individual. We are not required in this case to decide, whether an undertaker has a right to bury any body that is kept uninterred for any length of time; or whether one who voluntarily performs these offices is entitled to recover; or whether, where express orders are given, the party giving those orders is answerable for them: because in my opinion those questions do not here arise. I do not think that in this case there is any evidence to shew that the plaintiff acted upon the credit of the brother of the deceased. He might have said I will have somebody to whom I may look for payment before I will proceed; but of that there is no evidence, and we therefore must infer that no such understanding took place. In every case the undertaker must be sent for, but that is not giving an order so as to create a liability: he must in every case be apprised of the death, but that will not render the party who makes the communication answerable, any more than in the case of casual poor, to which allusion has been made. It is then said, that, if a contract be implied, it must in this case be, to defray the expenses of a funeral suitable to the degree of the testator. I do not think that it is necessary to enter

strong authority in support of the doctrine in the former case; because in like manner an implied contract may in this case be inferred, on the part of the executor, from the obligation imposed upon him with reference to his character and the estate of his testator.

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VAUGHAN, B.—I agree in the judgment which has been delivered by my learned brothers, and shall make but few observations upon the case. Looking to the record, I must assume that the defendant is executor, and has assets sufficient to pay this debt. I should certainly have been better satisfied, if, at the trial, it had been left to the jury to say whether the plaintiff performed the contract upon the credit of any other person; because, if that was the case, I am of opinion that the executor would not be liable. That course was not however pursued, and upon this report we are at liberty to infer that it was not done upon the credit of any third person. The discussion then resolves itself into a mere question, whether an executor is liable to pay the funeral expenses of the testator, where he has assets and no unnecessary expense is incurred. I do not consider this as a duty of imperfect, but one of imperative obligation. It is not pretended that there was in this case any opportunity to consult the executor, who lived at a distance; and what under such circumstances could be done, if the defendant is not liable? The *dictum* of Lord Chief Justice *Holt* is expressly at variance with the opinion of Lord *Ellenborough*, and, were it necessary, I should feel no difficulty in assenting to the latter authority; but it is not necessary to draw any comparison between the two cases, because, from the note of the former, it does not appear under what circumstances that opinion was delivered. The latter is a case precisely applicable to the present, acquiesced in by the counsel, and confirmed, if confirmation were required, by the opinion

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of the Chief Justice of the Court of *Common Pleas*. I consider the burial of the dead to be a clear obligation upon the executor, and think that he is liable for the expenses incurred, if in his absence that duty be performed for him by another.

Rule absolute(a).

(a) It is the first duty of an executor or administrator to bury the deceased according to his rank, and circumstances. Com. Dig. Administration (C). Prec. Chan. 27. So urgent is this duty, that it may be performed by an executor before probate; Toll. p. 24; and the performance of it will not constitute a stranger an *executor de son tort*. Off. Ex. 174. Swinb. 6, s. 22 n. 2. 2 Com. 507. 11 Vin. Abr. 207. pl. 24. The expenses of this pious office are of the first class in the administration of assets, and even though they be not paid, the executor may retain money for that purpose, and upon a question of assets the sum retained will be allowed. *Gillies v. Smither*,

2 Stark. N. P. 528. But in no case can an executor be justified in incurring an extravagant expense upon this head. If the assets be sufficient, the allowance shall be according to the degree and quality of the deceased, Com. Dig. Administration (C); but where that is not the case, he is only warranted, as against creditors, in doing that which is absolutely necessary; and, in strictness, where the estate is insolvent, he can be justified merely to the extent of paying for the coffin, shroud, ringing the bell, and the fees to the parson, clerk, sexton, and bearers. Toll. 191, 192. Com. Dig. Administration (C).

Ex parte ISAAC, In re OWEN, a Bankrupt.

Commissioners of bankrupt have no authority to commit a witness for refusing to read an entry in a book.

A witness summoned by commissioners, under the statute 6 Geo. 4, c. 16, s. 33, being required to read certain entries in a book, to which, during his examination, he had referred, but which he had not been called upon to produce, refused to read the entries, whereupon he was committed for refusing to answer the "said question."—Held that the warrant was bad in substance, and in form; a request to read not being a question.

ON a former day, a writ of *habeas corpus* had issued, on the application of *A. Isaac*, who had been summoned by the Commissioners acting under a commission of bankruptcy against one *Owen*, as a person capable of giving information concerning the person, trade, dealing, and estate

of the bankrupt, under the provisions of the 6 Geo. 4, c. 16, s. 33, and had several times been examined by them, in order to ascertain whether certain mortgage securities, given by the bankrupt to one *Leon*, were or were not tainted with usury. The witness had, during the progress of the examination, constantly objected to the mode in which that examination was conducted, principally upon the ground of its tendency to expose him to forfeiture of estate and interest; and, in consequence of his refusal to answer, he had been four several times committed. Upon the first occasion, the witness was remanded, and, on the second, discharged, by the Lord *Chancellor*; on the third he was remanded by Lord *Tenterden*; and the fourth application formed the subject of the present inquiry.

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It appeared from the warrant of commitment, which set out the examination, that, at the last meeting, the witness had been examined touching certain sums of money, entered in his books of account, amounting together to 9,000*l.*, being the consideration for the mortgage to *Leon* of a vessel of which the witness was, after the execution of the security, appointed ship's husband. This money was, as the witness stated, composed of two sums, the proceeds of *Russian* stock, the property of *Leon*, but which, it was suggested, was in fact the joint property of *Leon* and *Isaac*, who, by receiving commission in his character of ship's husband had, by that means, obtained usurious interest. The question, however, turned upon another part of the examination, which was as follows:

“ Q. Does the account headed *Russian* stock, in Ledger G. p. 101, contain an account of all the purchases and sales of *Russian* stock for Mr. *Leon's* account made by you?

A. Yes; it does, as well as those purchased by *Leon* himself.

Q. Do you mean to state that in such account there are entries of *Russian* stock purchased and sold, or purchased or sold by Mr. *Leon* himself, on his own account?

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mitment did profess to proceed upon a refusal by the witness to answer an interrogatory, yet that, in effect, it amounted to a question when construed *secundum subjectam materiam*; that the power of the commissioners to call for the production of books, authorized them to examine into the contents of the books, and that directing the witness to read the entries, was, in effect, asking their contents.

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ALEXANDER, L. C. B.—Several very important questions have arisen in this case, upon which I do not feel it necessary to express any opinion. It has, in the first place, been contended, that the account which formed the subject of this examination and ultimate commitment, is immaterial with reference to what had been previously elicited; but, although I entertain an opinion upon this point, it does not appear to me to be necessary to express that opinion.

It has, in the second place, been insisted, that the witness was not bound to answer, inasmuch as the tendency of the whole course of his examination was to subject him to penalty or forfeiture. Upon that point also, I forbear to express any opinion, because this warrant cannot be supported upon the particular ground on which it purports to be founded.

Without reference to either of these objections, I am of opinion, that, upon this warrant, the prisoner ought not any longer to be detained in custody. I have always understood that great strictness is required in the form of warrants of commitment, and that they must express a legal ground for the commitment and detention of the prisoner. Commissioners of bankruptcy are invested with extensive authority, but their powers must be exercised with caution and discretion. The statute under which they act, confers upon them an authority to commit in two cases merely. In the case of refusal to answer lawful questions, and of refusal to produce books, without

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a book into the room of the commissioners for the purpose of assisting my memory, and with that view have recourse to it, that I can be compelled to submit that book for inspection. They have no authority to impose such a command upon a witness. If the production of the book appear to the commissioners to be necessary for the purpose of a full investigation of the subject, a notice should be given to the party to produce it; and if he refuse to comply with that notice, he may be committed for his contempt. When produced, the production without doubt involves the inspection of the book. It appears to me, that there has been some degree of precipitation in committing under the circumstances of this case, for the warrant contains no allegation that he had been required by notice to produce the book. Suppose the witness having the book in his possession at the time, either for the purpose of refreshing his memory, or for any other purpose, had been commanded by the commissioners to produce the book, and had refused to comply with that demand, he could not in such case have been committed for his refusal, because the demand ought to be preceded by a proper notice to produce. But it has been urged that, during the examination, the witness had uniformly acceded to the course now pursued, and had read entries from his books, when called upon so to do. It is true, that he has read from his books in many instances, but his having pursued that course, does not render it incumbent upon him to persist in so doing, or pledge him to read every thing which the book may contain, provided it may be unnecessary to do so for his own purposes, or, for any other reasons, he declines to read any further. The conclusion of the warrant is not warranted by the premises. Unless the account related to the dealings of the bankrupt, it was not the legitimate subject of inquiry before the commissioners, and that alone was, in the language of the statute, a sufficient reason for a refusal to produce it. Upon this ground, it appears that the refusal proceeded; and this Court has no means of

knowing whether the account does in fact relate to the dealings of the bankrupt, or whether the commissioners had upon that ground any right to call for the production. But even if he were bound to produce the account, and it was legitimately in evidence before the commissioners, what, I would ask, is the proper course to be pursued? Who is bound to read the document produced in obedience to a lawful command? The document is to be used by the party who seeks to make it available to his own purposes. According to the course constantly pursued at *Nisi Prius*, it should be read by the solicitor or the commissioners; and if, after it had been read, the witness had refused to answer a question founded upon it, in that case the commitment would be sustainable.

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But to examine the peculiar language of this warrant—After having thus called upon this witness to read the book, which it may be assumed was lying before him, and he having refused to comply with this demand, for what does it appear that he is committed? Is it because he refused to produce the book? If so, the warrant is defective, and it cannot be said that he was properly committed for not producing that which it does not appear he was required to produce. But, on the contrary, he is committed for refusing to answer the “said question.” What question?—To read the entry. Can any one say, that this command to read entries in a book is a lawful question? But is the commitment, until he shall produce for inspection the book containing the entries? No; “until he shall full answer make, to their satisfaction, to the question so put to him;” which he can never do, because no question is put to him, and no question has he refused to answer. My judgment, therefore, in this case, without adverting to the other topics which have been urged, is, that, for the reasons which I have stated, this warrant is bad in form and in substance.

VAUGHAN, B.—I should be very sorry, if the power of commissioners to obtain a full discovery of bankrupt's

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It is clear, that the bankrupt could not, in this case, have been committed substantively for a refusal to answer. That ground of commitment is therefore illegal, and, inasmuch as he is to be detained in custody until that which is illegally required of him be done, the whole commitment is invalid, and the bankrupt is entitled to his discharge. *Ex parte James (a).*

Cur. adv. vult.

GARROW, B.—The warrant of commitment is the only document upon which this Court is now called upon to act in issuing a writ of *habeas corpus*, to bring up and discharge the bankrupt. To this warrant, two objections are made. It is, in the first place, contended, that the examination should be set out; and secondly, inasmuch as the commitment proceeds upon a specific ground, namely, a refusal to sign, that the conclusion of the warrant which authorizes an imprisonment until he shall sign and answer is not justified by the premises. It is not suggested that there was any thing illegal in the examination of the bankrupt, or that any question was put to him, which he might properly refuse to answer, but on the contrary, it must be taken, that the examination was unexceptionable, and that, having been called upon to sign his examination, he was, for his refusal, committed for that specific offence. It is clear, that, to enable the commissioners to carry into effect the object of the bankrupt laws, a discretion must be vested in them, to decide whether their proceedings are, or are not, in the first instance legal. Such a discretion is incident to every Court of justice. Where however that discretion is exercised in the allowance or disallowance of an objection to an answer, and as the result of their decision a party is committed to prison, the whole examination must be set out upon the commitment, because

(a) 1 P. Wms. 611.

wording of the examination, or otherwise, he refuses to sign it, and, in the words of the act of Parliament, is committed to prison until he shall full answer make to such questions as shall be put to him, and sign and subscribe his examination. The language of this warrant precisely pursues that of the statute upon which it is founded; but I agree that the conclusion would, in strictness, have been more technical, if, as suggested by my brother *Garrow*, it had authorized the detention of the party until he should have signed his examination merely; but this, however, is a mere formal objection, and we are bound to see whether the warrant is in substance sufficient. For what purpose can the examination be required to be set out? The 17th section of the act of Parliament provides that in certain cases the questions shall be set out, and we must assume that in such cases only is it necessary to state them; for, if the legislature had thought it expedient that the commissioners should set forth the examinations in every case, that would have been provided for. There is, however, no such positive enactment, and the enumeration of particular instances is an exclusion of the general necessity. But for what purpose is the examination to be set forth in this case? Is it to enable the Court to see that the bankrupt has not been entrapped into an examination of matters irrelevant, or such as could not lawfully have been required of him? No such suggestion is made, although, by the 18th section, it would seem, that, if in fact there was any reasonable ground for his refusal to sign, that might have been shewn upon this application. No case can be found which is precisely in point with the present, but there are two which cannot, in my opinion, be supported, provided it was in this case necessary that the questions should be set out. In *Nobes v. Mountain*, a bankrupt was committed for refusing to be sworn. The ground of objection was not in that case set out; and if, therefore, the argument be well founded upon the present occasion, that decision was

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wrong; for the Court of *Common Pleas*, in that case, decided that the warrant of commitment, which was general, for refusing to be sworn, was good, and that it was not necessary to add the reason for the refusal. The case of *Ex parte Page* (a) is also in principle similar to the present. In that case, the bankrupt was committed for his refusal to be sworn, and it was held that it was not necessary to set out any specific question. Now, it was equally necessary, in both these cases, to set out the objection of the bankrupt to be sworn, as it was, in this, to state the examination upon which an objection might be founded, and therefore, I think, without impugning the decisions to which allusion has been made, and to which I give my humble assent, that it was not in this case necessary to set out the examination.

With respect to the conclusion, I feel some difficulty, but it is, in my opinion, a formal objection merely. The distinction between matters of form and of substance, I take to be this:—Where one who is committed for not answering a question, or answering unsatisfactorily, or for not signing his examination, is brought up by *habeas corpus*, if it appear either that the answer was sufficient, or that the questions were improper or immaterial, or that he had good reason for refusing to sign, in either of these cases, the commitment is substantially defective; but wherever, as in this case, there appears to be a *corpus delicti*, there the objection is but an objection of form, within the meaning of the 18th section of the statute. Now, it has not, in this case, been made to appear, that the bankrupt had any good ground for his refusal to sign, and, therefore, I think that the objection is one of form merely, and that, if brought up upon this ground, he would be re-committed. For these reasons, without affecting to say that this is a clear case, I am of opinion that the rule should be discharged.

(a) 1 B. & A. 568.

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held, that the commitment was substantially defective. The principle, said that learned Judge, is, that when the validity of the commitment is discussed upon the return of the *habeas corpus*, the Court cannot travel out of the warrant of commitment; for the principle is the same here as in the Courts of law, where the Judges have not the means of informing themselves as to what passed at the examination by an inspection of the proceedings, which, as Lord Chancellor, I am enabled to do. An application, like the present, is, therefore, in the nature of a special verdict, or of a proceeding in a Court of Error, where the Court is not at liberty to look out of the record. We cannot travel out of the warrant of commitment, and it must stand or fall by the terms in which it is expressed. It being admitted that there is no case precisely similar to the present, and this case being to be considered upon the terms of the act of Parliament, let us see what those terms are. By the 16th section, if the bankrupt shall refuse to answer, or shall answer unsatisfactorily, or shall refuse to sign his examination (not having a reasonable objection either to the wording thereof, or otherwise, to be allowed by the said commissioners), it shall be lawful for the commissioners to commit him to prison, until he shall answer and sign his examination. I read the latter part of this section *reddendo singula singulis*, that is, if the commitment be for refusing to answer, he shall remain in prison until he answer; if for refusing to sign, until such time as he shall sign. Upon principle, it appears to me, that the same reason which requires the examination to be set out upon a warrant of commitment for refusing to answer, equally applies to a case where the refusal to sign is the ground of the commitment. The Court have no means of determining whether the commissioners did right in committing, for it does not appear upon the face of the warrant what were his objections for refusing to sign. It is said that it is competent for the party who moves for a writ of *habeas corpus* to

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plaintiff for the whole period, and also for the six months next preceding the commencement of the action. Under this direction the Jury found a verdict for the plaintiff, expressing their opinion that the injury arose from the wilful waste of water in the management of the canal, but was not attributable to the corn mill, iron mill, and steam engine. They estimated the damages, for the whole period, at the sum of 517*l.*, and at that of 172*l.* for the six months before the commencement of the action. The verdict was entered for the plaintiff for the larger sum, and the learned Judge reserved to the defendants leave to reduce that verdict to the smaller sum, if the Court should be of opinion that the plaintiff was, by the provisions of the statute, confined to a cause of action accruing within six calendar months next before the commencement of the action.

A rule *nisi*, to that effect, having been obtained by *Taunton*, who cited the case of *Gaby v. The Wilts Canal Company*(a), this question was twice argued. On the first occasion, before *Garrow, B.*, and *Vaughan, B.*, during the indisposition of *Hullock, B.*; and afterwards before the three learned barons in the absence of the Lord Chief Baron, who was presiding in equity.

Ludlow and Russell, Serjeants, and Justice, contended, that the limitation clause did not apply, first because the wilful conduct of the defendants, as found by the Jury, precluded them from insisting that they had acted in pursuance of the act: secondly, because the cause of action was not an act or fact committed; and lastly, because there was a continuation of damage. In support of the first proposition, it was insisted that the wilful conduct of the defendants rendered them wrong-doers, and that although

(a) 3 M. & S. 580.

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year 1825 ceased ; it ceased for a considerable length of time. My notion is, that, if he would seek redress for that which happened in the year 1825, he must bring his action within six months after the ceasing of that damage, which continued for a season. New damage arises. It continues for a certain time, and then it ceases again. My opinion is, that for that which had so ceased in the year 1826, he should have brought his action within six calendar months next after that damage had ceased, and if he does not do so, but waits until the year 1827, when new damage arises, he cannot bring all these together and call them a continuing damage, from the time at which they originally commenced, down to the time at which he brings his action, or six months before that time. My opinion is, that if, from any cause (and causes might be easily imagined), that which is likely to produce damage has produced no damage, in that case the party is not entitled to any remedy, for it is upon proof of damage that he is to have his redress. Let me suppose the construction of these respective weirs, or any other act done on the line of the canal, to be likely to produce injury, but the state of the seasons to be such, that, in point of fact, no damage is sustained ; suppose, after the damage which occurred in the year 1825, the capital of the proprietor of the works had been directed to another species of employment, so that the works, which before required the ample supply of all the surplus water of the canal, did not then require so large a supply, and so that although, in point of fact, the weirs should have continued in a condition, in which in other seasons they had produced damage and inconvenience, for which the party was entitled to his remedy, the remedy and redress being for damage done and sustained, it appears to me, if from either of these, or any other cause no damage was sustained, he would not be entitled to his action. The short result, therefore, of my opinion on this subject, after giving it as much attention

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different intervals in that time, the party has a right, though it is a case within the act of Parliament, to go back under the last words of the clause, which confines the limitation of actions to the original commencement of the damage, on the ground as it is contended that there was here a continuation of the damage.

With respect to the first argument, I own there appears to me to be very considerable difficulty in that part of the case; and if all the counts in the declaration, on which the plaintiff has obtained a verdict, contained a complaint of non-feasance, of omission, and of matters which could not be ascribed to an act done or fact committed, I certainly should have taken much more time to deliberate on this question than it appears to me, now constituted as it is, to require. But it cannot be forgotten, that, though there may be some counts in the declaration which may be considered as grounds of complaint against the defendants, for matters of omission and non-feasance, yet, the first counts of this declaration are distinctly and specifically framed on the statute. For example, the weir in question is constructed under the act of Parliament, by the 6th section of which it is enacted, that a proper weir shall be made on the side of the said canal, above the said *Melin Griffith* works, for the purpose of letting off or conveying the surplus water, or such as shall not be necessary for the use of the said canal, into the cut or water-course belonging to the said *Melin Griffith* works; and for better securing such surplus for the use of the said *Melin Griffith* works, the lock which shall be made upon the said canal, below and nearest to the said works, shall always be kept in good and sufficient repair and condition, by the said company of proprietors, for the purpose of preventing leakage or waste of water. Now the weir in question, was made under the authority of that act. In the language of that act it was done in pursuance of the act; and the ground of complaint in those counts which contain a charge for the

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pears to me, that it would require great consideration before we could decide that some of the complaints in this declaration were not matters of non-feasance, and omission, not within the act of Parliament, which prescribes the necessity of bringing the action within a limited time after the act done, or fact committed. But for the reasons which I have stated, it is unnecessary, and I do not feel myself called upon, to consider that part of the subject further.

With respect to the latter point, admitting, as is said, that the argument upon the former is not sustainable, yet, here, in point of fact, the plaintiff is entitled to recover the larger sum, inasmuch as it appears upon the facts disclosed, that there was a continuation of damage from the beginning. It does not appear to me, however, from the manner in which this act of Parliament is framed, that that argument can be sustained. The weir is erected professedly for the purposes of the act of Parliament, and in conformity with its provisions, but it is not constructed in such a manner as to permit that quantity of waste or surplus water, which is unnecessary for the purposes of the canal, to flow over it for the supply of the works of Mr. *Blakemore*. Now it might be, that that canal was imperfect from its original formation or construction; but supposing, either from weather, or from natural causes, or from other circumstances,—from the suspension of the works of *Melin Griffith*, or any other cause, which rendered it unnecessary to have a supply of waste water—no damage ensued for six or ten months, or for a year after the time of the erection of the weir, the weir being imperfectly erected for the purpose of the act of Parliament, could any action be brought, *quia timet*; because the weir in certain seasons might induce injury to the works below; and though no damage had been sustained, could it be said, I can sustain my action, otherwise I can never bring one? In what way

could an action of that sort be sustained? What damage has the party received? Could it be possible to prove, on such a trial, that damage which had not been sustained *ex concessis*, ever might be sustained under any circumstances. That case, in my judgment, falls within the principle of the decision in *Roberts v. Read* (a). In that case, surveyors of a road had undermined a wall, which did not fall until more than three months had elapsed, within which time, by the statute 13 Geo. 3, c. 78, sect. 81, actions must be commenced for any thing done or acted in pursuance of the act. The action was not commenced until the wall had fallen, and it was contended that the action was too late, because the act done was the undermining of the wall. The Court of *King's Bench*, however, decided (I shall say with great submission, most properly, and the principle can hardly be controverted), that the gravamen of the action (in the language of the learned Lord who at that time presided in that Court,) did not commence until the falling of the wall. I am quite aware that in a case in the Court of *Common Pleas*, of *Sutton v. Clarke* (b), Lord Chief Justice *Gibbs* did, in one part of the argument, say that he thought he should have had great difficulty, as one of the members of the Court, to have acceded to that decision: he said it was a strong case. But I think it may be collected from the subsequent observations in the remaining part of the report, that the learned Judge did recognize the decision, and seemed to think no other decision, under the circumstances, should be come to. Assuming that it was a sound one, which it appears to me to be, it goes a long way to shew that you cannot sustain this action for the several injuries which occurred at the different intervals during the last two years, but are confined to the injuries sustained during the six months preceding the

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(a) 16 East, 215.

(b) 1 Marsh. 429; 6 Taunt. 29

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commencement of the action. If you cannot sustain an action until the injury had commenced, the injury does not commence until a year after the weir was constructed. It produces injury, but the canal is the same: I am assuming, as I understand, upon the evidence, that the cause of the injury never altered its form or effect, that is, the original construction of the canal was incompetent for the purpose of passing the waste and surplus water; and that that canal never underwent any change in the mean time. The cause remained the same, but from various circumstances the damage only occurred at intervals. The works of the *Melis Griffith* might have been suspended from various causes, or they might have been diminished in their operations by a reduction of the machinery, so as to have rendered a less supply of water sufficient for the purpose of the works. During that time there is no damage at all; the damage recommences and lasts three or four months, and then there is another interval; now, if you could, in point of fact, consider this in the language of the act of Parliament as a continuation of the damage, why, then, so far from being fettered by the restriction of this act of Parliament, you might, in my mind, get out of the restriction created by the general statute of limitations, because, if for the first year there was no damage, and then there is a partial damage for three or four months after an interval of three or four years, and then fresh damage, then another cessation of damage for a year; if you could go back to the original commencement of the damage, merely because the weir continued the same, you might, and the argument would be equally just, go back ten or twenty years. There would be no more objection to the principle on which that argument stands for compensating damage anterior to the six years, than there would be for compensating damage anterior to the six months before the commencement of the action. It appears to me that *ex vi termini* the words of the act of Parliament, in case there

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therefore, to me, that the defendants are within the protection of the limitation clause.

If, then, the defendants are entitled to the protection of the statute, can the action be said to have been commenced within six months after the acts done, or fact committed. Strictly speaking, the *causa causans* was in existence long anterior to that period, but the *gravamen* of the action is the resulting damage, part of which is sustained within six months, in respect of which the action may be maintained upon the principle laid down in the case of *Roberts v. Read*, although, if construed rigidly and strictly, the act done was in this case the erection of the weir, and in that the undermining of the wall. It is true that the authority of that case was questioned by Lord Chief Justice Gibbs, in the argument of *Sutton v. Clarke*, although he seems to recognize the principle; but that point was not determined. Were it necessary to decide that point, I should not hesitate to hold that, for the purposes of this action, the continuation of the weir was in effect a new erection, operating to the damage of the plaintiff; but it is unnecessary to pursue this question, because the defendants admit that the plaintiff is entitled to the smaller sum.

In order to entitle the plaintiff to the larger sum, it was necessary to contend, that there has been a continuation of damage, without ceasing, from the month of *April*, 1825, until within six months before the commencement of the action. Upon the same principle, it might be insisted that the plaintiff might recover for all the damage he had sustained from the first erection of the parliamentary weir, and for the continuation of the feeding weir, for the same period of time. For what are the facts of the case? The plaintiff confines his evidence to the years 1825 and 1826, beginning with *April* in the former year. It is distinctly admitted, that, in the autumn of 1825, he ceased to sustain any damage until the spring of the following year, his works being abundantly supplied, during that period, by.

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upon the cross-examination of the plaintiffs' witnesses, that no contract under seal had been executed by the proprietors, although a contract had been signed, by which they agreed to bind their heirs; and that, at the commencement of the action, the sum of 164,400*l.* had not been subscribed. Upon this it was objected, that the act of Parliament had been obtained by false representation, the sum required not having been subscribed, and no contract having been signed which could bind the heirs of the subscribers; and that the only mode of proving the defendant to be a proprietor, was by shewing that he had subscribed a contract binding his heirs. The learned Chief Justice reserved the point, giving the defendant leave to move to enter a nonsuit; and the Jury found a verdict for the plaintiffs.

In pursuance of this leave, *Denman*, in *Michaelmas* Term, obtained a rule *nisi*, to enter a nonsuit, renewing the objections urged at the trial, and citing the case of *The Thames Tunnel Company v. Sheldon*(a).

Clarke, Campbell, and Balguy, shewed cause. The 70th section, which gives the form of action, points out the evidence which must be adduced by the plaintiffs; and the simple question under that section is, whether the defendant was or was not a proprietor. He is stated to be a proprietor, by name, in the act, and admits that he is so by paying the previous calls. Suppose that, upon the day of trial, he had said, I am a proprietor, that would have been sufficient, under this section, to entitle the plaintiffs to recover. The payment of his calls would have estopped the company from disputing his title as proprietor; there must be a reciprocity, and therefore, by the same act, he is precluded from denying it. Was it then competent for the defendant to impeach the validity of the act of Parliament, by proving that no contract under seal was executed? The 121st section recites, that a cer-

(a) 6 Barn. & Cress. 341.

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been sufficient, still it was competent for the defendant to shew that the act proceeded upon a misrepresentation or mistake, and it cannot be contended that he is bound by the recital, if that can satisfactorily be proved to be false. Suppose a recital to be introduced, that *A.* was a willing party to an act of this description, which, although a public act, is merely in the nature of a solemn contract between individuals, by which his interest would be prejudiced; would it not be competent for him to prove the fraud of that recital, and to dispute the validity of that statute? But, admitting that the act of Parliament relieves the company from the proof of any thing beyond the single fact that the defendant was a proprietor, there is no evidence that he was a proprietor within the meaning of the act. Taking all the clauses together, it is the manifest intention of the legislature that the proprietors should be those who had subscribed the contract under the 121st section, *viz.* a contract binding themselves and their heirs. Has the defendant subscribed such a contract? It is clear that he has not, for no instrument would have that effect but a contract under seal, which does not exist. The object of the act was to protect the interest of those who might be affected by the undertaking, for which purpose all the property of the proprietors was to be liable, and the question is not affected by the nature of the property which the proprietors took in the shares. The case of *The Thames Tunnel Company v. Sheldon*, is in point to shew that it is immaterial what acts the defendant may have done with reference to the undertaking, provided the act of Parliament has not been complied with. In that case, the defendant had applied for shares, had paid the deposit, and his name was mentioned in the act; but, as he had not subscribed within the meaning of the act, he was not considered to be a subscriber liable for calls.

ALEXANDER, L. C. B.—The only question is, whether the defendant is answerable for these calls. Now the act

directs that he shall be liable, provided certain forms are pursued, which it is admitted have in this case been complied with. That is not the objection, but it is said that the act of Parliament cannot be enforced, because of a mis-recital in a most material particular. The act states that the undertaking will amount to a certain sum, which has already been subscribed by several persons, under a contract, binding themselves, their heirs, executors, administrators, and assigns; and in consequence of that contract not being under seal, the heirs of the subscribers cannot be bound, and, therefore, the defendant says the heirs not being bound, I am not bound. Such I understand to be the argument in this case. To this it is in the first place objected, that it is not competent for the defendant to shew that that which is stated as a fact in this act of Parliament is a mistake or mis-recital. If I thought it necessary to express any opinion upon that point, I should wish to have time for consideration, because very many plausible cases might be put, in which great injustice would be done if a party were to be bound by a mis-recital in an act of Parliament; and on the other hand, the most grievous consequences might arise in the administration of justice, were it permitted to parties in a Court of law to impeach the authority of an act of Parliament. I can conceive a case of great hardship if it were fraudulently represented that a party had consented to an act of Parliament, and he were not at liberty to dispute it; but, on the other hand, I am not prepared to say that it would not be the safer course to give way to the individual hardship, rather than to permit a general inquiry into the validity of acts of Parliament upon all occasions. I am glad, however, that I can, in this case, satisfy myself without entering into that inquiry; for, without determining that point, I am of opinion that this defendant has, by his own conduct, estopped himself from making the objection. He is a party to this act of Parliament in which the alleged mis-recital is

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contained, not only as one of the public, but as an individual proprietor named in the act, and one who has signed the contract, which it is said is mis-recited. The act passes with that which for the argument I assume to be a misrecital, and in obedience to the act, and, treating it as if it were unobjectionable, the defendant pays several calls, claims the benefit and takes advantage of the act, and by so doing gives a colour to it. It is impossible to say that many individuals may not have been induced to subscribe under the influence of his example. He has acted and held himself out to the world as a proprietor, and after such conduct cannot now say that he is not a proprietor, or question the validity of the act of Parliament, which by his conduct he has adopted. I therefore think that the rule should be discharged.

GARROW, B.—I am of the same opinion, and think that were this defence to be sustained, it would be fraught with the most alarming consequences to the community at large. We know, in the history of these companies, that needy adventurers have not unfrequently associated themselves together, using the names of influential persons, and have obtained acts of Parliament, under the power of which they have, by leaving their works unfinished, devastated the country into which they proposed to carry immense benefits. To guard against this grievance, it has been ordained by both houses of Parliament, that a certain proportion of the sum required should be subscribed before the act is passed, in order to insure the completion of the work, and in consequence of a non-compliance with the standing orders, and of a mis-recital in this respect, it is said that this act of Parliament is a nullity. I cannot do better than follow the example of the Lord Chief Baron, who has refrained from expressing any opinion upon the question, how far the defendant is bound by the recital in this act of Parliament, although, as it seems to me, that

question involves but little difficulty, because I am clearly of opinion that the defendant has, by his conduct, estopped himself from disputing it. Before the act of Parliament is obtained, he applies for certain shares—he concurs in the application to the legislature, and is named as a proprietor—he pays his calls so long as the concern is prosperous, and, by so doing, holds himself forth to the world as a proprietor, and takes advantage of the act. For some reason, perhaps because the project is likely to be unprofitable, he now refuses to pay these calls, and objects to the validity of the statute; but I think that if he were permitted to do so, other proprietors might also upon the same ground withdraw from the undertaking, to the manifest injury of the individuals through whose property the railway has passed, and probably to the ruin of several who may have been induced to subscribe under the influence of his example.

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HULLOCK, B.—I entirely concur in the opinion which has been expressed, and in the grounds upon which that opinion has proceeded. The question is, whether the declaration, as framed, has in fact been supported, and we must look to the situation in which the defendant has placed himself, and to the terms of the act of Parliament, in order to ascertain whether he be or be not a proprietor within the meaning of the statute. The name of the defendant occurs in the first section of the statute, which, after naming several individuals, enacts that they, together with such as should thereafter become subscribers to the undertaking, should be incorporated into a company to carry the act of Parliament into execution. I admit that that circumstance alone would be entitled to but little weight; but the defendant in this case does more; he signs a contract by which he undertakes to bind his heirs, but, unfortunately, that contract not being under seal, the heirs are not bound, and upon that ground it is contended that he is altogether released. All that the defendant did in the

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case alluded to, was to contribute a small sum to start the undertaking, to enable the solicitor to apply for the bill; but he signed no contract, and no further participated in the undertaking. This act of Parliament then passes, with a recital of that which in point of fact was untrue, because the full sum stated had not at that time been subscribed; but it does not contain any provision similar to that which was contained in the *Thames Tunnel* act, *viz.* that, until the full amount had been subscribed, the act of Parliament should not come into operation. On the contrary, it recites that the whole sum was subscribed without taking the precaution observed in that case. After the act passed he pays the calls. He knew at that time that he had not executed a contract that would bind his heirs, he waves that with a full knowledge of all the circumstances, and it was competent for him so to do, but he cannot now turn round and say, upon that very account I am not a proprietor. The 70th section prescribes the form of action, and points out the evidence which shall be sufficient to support it. By that section, all the preliminary proofs are dispensed with, and the only fact which, for the purposes of this inquiry, it was necessary to prove was, that the defendant was a proprietor. The question therefore is, who is a proprietor within the meaning of this act of Parliament? It is said, that he only is a proprietor who has signed a contract binding his heirs. I confess that in my opinion the argument upon that point would have gone to a much greater length, if the name of this defendant had not been inserted in the act, and he had acted in ignorance of the real state of the case. But it is unnecessary to express any opinion upon that point, because, upon the facts of the case, no doubt can be entertained that he is a proprietor. Upon what other ground does he pay his calls? what other reason can be suggested for his conduct? and what other inference can be drawn from his acts? I think that by his conduct he has admitted his character as proprietor, and has estopped himself from

disputing that fact. I humbly conceive, that the case to which allusion has been made, was rightly decided upon the ground stated in the report; but there seems to me to be another point upon which that case might have been disposed of, *viz.* that the subscription of the sum required was a condition precedent to the operation of that act; and if that condition had been engrafted in this case, my opinion might have been different. The judgment of the Court in that case assumes, that, had the defendant subscribed, he would be liable for future calls; but in fact he had not subscribed, and the only circumstance relied upon was the advance of a small sum to start the undertaking, which did not prove that he was a subscriber. I do not say that the mere insertion of the defendant's name as a proprietor, would be sufficient to render him liable; but we should be going a great length, were we to permit a party, who, conscious of all the facts, holds himself forth as a proprietor, and acts as such, to turn round at any period and say there is a defect in the constitution of this company, which renders me irresponsible.

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VAUGHAN, B.—The true way to try this question is, to look to the record and to the report, and thus to ascertain whether, in the terms of the act of Parliament, the declaration is sustained. The act of Parliament is framed with a view to relieve the company from unnecessary proof, and requires evidence, first, that the defendant was a proprietor, and, secondly, that the calls were duly made. In effect, therefore, the question resolves itself into a simple point, notwithstanding the extensive range of the argument, *viz.*, whether this defendant is clothed with the character of a proprietor. Two objections are, however, taken; first, that the defendant is not a proprietor, and, secondly, that the act of Parliament has been obtained by fraud and misrepresentation; and therefore that the defendant is discharged from his obligation. I do not feel it necessary to express any opinion upon the second

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objection, because I think that the facts of the case do not warrant it. That question is raised upon the recital in the 121st section, which is, that a certain sum has been subscribed under a contract binding the heirs of the subscribers, which is said to be untrue in both respects—first, because no such sum was in fact subscribed—and, secondly, because there was no contract under seal. With respect to the first, it is clear that no fraud has been committed. It is said to be in direct violation of the standing orders, that any act of this description should pass, unless four-fifths of the amount required has been already subscribed. But, although the sum stated was not in fact subscribed, yet the amount actually subscribed was more than that which was required by the standing orders. If a much smaller sum had in fact been subscribed, it would be evidence of a fraud, but when the standing orders have been complied with, that negatives the fraud. Is the fraud made out with respect to the other point? I think not. Although that is not the legal effect of the contract, because it wants the solemnity of the seal, yet, it purports to bind the heirs; and such was obviously the intention of the parties. I therefore think that it is a mistake, merely, in stating the effect of the obligation, and that it would be dangerous were the objection to be allowed. Is he then a proprietor, upon the facts disclosed? The bare insertion of his name would not be sufficient; but I will admit for argument, that that was inserted without his approbation, still he signs a contract, he pays his calls, and holds himself forth as a proprietor, and by so doing recognizes the act, which, in the first instance, might have been without his authority. I think, therefore, that these acts do prove the defendant to be a proprietor, and, that being the only fact necessary to be proved, that the defendant is liable, and that the rule should be

Discharged.

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ON a former day, Sir *William Owen* obtained a rule nisi to discharge certain fines and amerciaments, imposed by the Commissioners of *Sewers*, for the county of *Somerset*, and estreated into this Court, with costs to be paid by the Commissioners. The fine had been imposed upon *Taylor* for refusing to attend the customary view before the *October Sessions*, 1826, upon the verbal summons of the foreman of the *Edgerley Jury*, a standing jury, upon which he had been sworn in the year 1821, and had attended for several successive sessions, without being re-sworn. *Laver* was fined for refusing to be re-sworn as a jurymen upon the *South Drain Jury*, in which he had originally been sworn, and had acted for several sessions; the ground of his objection being, that, by the practice of the Court of *Sewers*, every jurymen is compelled to serve for life, or until he shall be discharged by the Commissioners. The amerciaments were imposed upon *Edwards* and *Haine* for neglect of sewer work, upon presentments of the *Godney* and *Heathmine Juries*, which were standing juries summoned for particular districts, not sworn at each session; and the presentments were made upon their own view, and not upon evidence on oath.

The Court will not, upon an application to discharge an amerciamment, enter into a disputed question as to the validity of the practice of the Court of *Sewers*.

Where *A.* was fined by Commissioners of *Sewers* for refusing to be re-sworn upon a standing Jury, the Court discharged the fine, it being admitted that it was not usual to re-swear the Jury, except upon the issuing of a new commission.

10 ALB 625

In answer to this application, the affidavit of the clerk of the Commissioners set forth the practice of the Court of *Sewers*, from which it appeared, that, from the time of living memory, the Commissioners had been accustomed to hold their sessions in districts of the county, for which districts several juries were respectively summoned and returned, upon a precept issued by the Commissioners to the Sheriff, upon the issuing of any new commission of sewers; and that, annually, the clerk of the court obtained

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from the Sheriff a deputation to summon the several juries, in pursuance of which, he, from time to time, issued a warrant to the foreman of such juries, requesting their attendance at the several sessions ordered by the Commissioners. The affidavit then set forth the oath of the foreman and jurymen (a); and it further appeared, that it was not usual to re-swear the jury, except only when a new foreman was chosen, or a new commission issued.

In support of the application, it was objected, upon the authority of the case of *Rex v. Commissioners of Sewers for the county of Somerset* (b), that the whole proceedings of the Commissioners were illegal; and the case of *Ex parte Owst* (c), was cited as a precedent for the form of the application.

To this it was answered by *Jervis* and *Jeremy*, that the application was cumulative and irregular, the proper course being to remove the proceedings into the Court of *King's Bench*, or to traverse the amerciaments. That, with respect to the fines, every Court had a power to regulate its own proceedings consistent with law, and, in an application like the present, which was simply *in misericordia*, the Court would presume that every thing had been legally done.

ALEXANDER, L. C. B.—The best conclusion I can arrive at in this case is, that, with respect to the fine upon *Laver*, the rule should be made absolute without costs; and that, as regards the others, it should be discharged. With respect to *Laver*, the case is clear; he is fined for refusing to be re-sworn, which is not usual, as it appears from the affidavits; and therefore, I think that the Commissioners have mistaken their course. If this fine had been imposed for a refusal to serve, it would have been different; but, as it is not usual to re-swear the jurors, the Commissioners should

(a) See 7 East, 72.

(b) 7 East, 71.

(c) 9 Price, 117.

have submitted to his objection, and, upon his default to serve, have fined him for that default. The other cases come under very different circumstances, and I cannot think that this Court should, in an application like the present, interfere, except in a very clear case. We have to consider not only what power the Court has, but what power it is expedient under the circumstances to exercise. I do not say that in no case would the Court interfere, for each application must depend upon its own merits, but there is a very great inconvenience in trying the validity of these proceedings in this shape, instead of removing them into the Court of *King's Bench* by *certiorari*, where the question may be neatly raised before the Court. It would, in my opinion, be highly inexpedient to entertain an application in the present form, which impugns the whole practice of the Court of *Sewers*, in a single rule, involving a variety of cases.

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The other Barons concurred.

Rule absolute, without costs, to discharge the fine imposed upon *Laver*, and discharged as to the others.

THE ATTORNEY-GENERAL v. GAUNTLETT.

THIS was an information against the defendant for cutting and carrying away large quantities of peat and turves In pleading a right of common by prescription the defendant must shew a seisin in fee of the land in respect of which he claims, and prescribe in the *que* estate for the right.

Where a defendant justified under a right of common of pasture, by shewing a demise from a freeholder for life of the land in respect of which he claimed, and averred that he, the defendant, and all those whose estate he then had, and his landlord, from time &c., had common of pasture in respect of the demised premises:—*Held*, upon demurrer, that the plea was bad.

The statute 52 Geo. 3, c. 71, for the better cultivation of navy timber in the forest of *Woolmer*, in the county of *Southampton*, which (s. 8,) enacts, “for the regulating and securing to the several persons now having right of common of pasture in and over the said forest, the power of cutting peat and turves within such parts of the said forest as shall not be inclosed by virtue of this act, that, after the inclosure shall be made and completed, it shall be lawful for all persons having right of common in the said forest, to cut and take peat and turves in any part of the said forest not inclosed under this act, without payment of any fee or sum of money to any keeper or other person having the care or superintendence of the said forest for taking the same,” merely regulates the previous existing rights, but confers no new right, and authorizes those only who before had the right of estovers and common of pasture to cut without payment of fees for the necessity of the dwelling-house, in respect of which the original right existed.

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from the forest of *Woolmer*, in the county of *Southampton*, the property of the King in right of his crown. The defendant pleaded—that, before the passing of the statute 52 *Geo. 3*, c. 71, intituled, “An act for the better cultivation of navy timber in the forest of *Woolmer*, in the county of *Southampton*”, one *S. Stillwell* was, and still is, seised in her demesne as of fee, as a freeholder for life, of and in a certain messuage, tenement, land and premises, with the appurtenances, situate in the parish of *Bramshott*, within the said forest, which she, on &c., demised to the defendant, to hold from year to year; by virtue of which demise the defendant entered into the said tenement, with the appurtenances, and had possession thereof until and at the passing of the act, and at the said time when, &c.; that the defendant and all those whose estate he then had, and the said *S. Stillwell*, from time &c., had, and still of right ought to have, common of pasture, in, over, and upon the said forest, for all her and their commonable cattle *levant* and *couchant* in and upon the said messuage and tenement and land, with the appurtenances belonging and appertaining, and that the defendant claimed and was entitled to the said right of common, in, over, and upon the said forest, as to the said messuage &c. appertaining, and that the defendant, at the said time when &c., entered &c., for the purpose of cutting and taking peat and turves in the said parts of the said forest &c. not inclosed, and did then and there take the same, as he lawfully might, according to the form of the statute. To this plea the *Attorney-General* filed a general demurrer, and the defendant joined in demurrer.

Coleridge, in support of the demurrer.—The question in this case turns upon the construction of the statute 52 *Geo. 3*, c. 71. That statute, after making certain provisions respecting the inclosure of the forest, and the protection of the timber there, by the 8th section enacts, “for the regulating and securing to the several persons now

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having right of common of pasture in and over the said forest, the power of cutting peat and turf within such parts of the said forest as shall not be inclosed by virtue of this act; that, after the said inclosure shall be made and completed, it shall be lawful for all persons having right of common in the said forest, to cut and take peat and turves in any part of the said forest not inclosed under this act, without payment of any fee or sum of money to any keeper or other person having the care or superintendence of the said forest, for taking the same. And no person shall, after the said inclosure shall have been made and completed, take, demand, or receive, any sum of money or fee, or other payment whatsoever, of or from any person cutting or taking such peat or turves on any pretence whatsoever, any usage &c. to the contrary notwithstanding." Now, in the first place, a right of common of pasture in the ordinary sense, is by the act made, and by the plea alleged, as the foundation of the right claimed. It is, therefore, subject to the ordinary restrictions, and must in pleading be claimed in the common way. Being common appurtenant it might have been acquired by modern grant; but it is pleaded as depending on prescription, and prescription, from the nature of the thing, cannot depend on an estate for life (a). The object of the legislature was to regulate and secure a right previously enjoyed, and not to confer a new right. It appears from the preamble, that rights of common and various other rights were claimed over the forest, and from the 8th section it may be collected that by custom a fee was payable for cutting peat and turves. The reasonable construction of the act, therefore, is, that it was intended to secure the former right in all the uninclosed parts, and to regulate that right by taking away the fee. The power of cutting peat and turves must allude to a common of turbary, for otherwise there is no limitation by construction of law, and it is inconceivable

(a) See Com. Dig. Pleader, 3 K. 24.

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that the statute should have imposed none in fact. It is probable, however, that this customary payment may have occasioned a doubt whether the right of cutting turves was strictly a right of common; and that may account for the omission of the word common, which is clearly not accidental, for, in the 52 *Geo. 3*, c. 72, which is passed *in pari materia*, the word common is inserted. But whatever the right was, it existed in commoners only, and the object of the enactment was to benefit them alone. Nothing can be more injurious than an user unrestricted in any way; and therefore it is, that no right of this sort can be unrestricted. Thus common *sans nombre* appendant is limited by levancy and couchancy. But the plea claims a general unrestricted right, and upon that ground also is vicious.

Jeremy, for the defendant.—A sufficient estate is shewn in the lessor, and the defendant is entitled to this common in respect of that estate. Whenever a man justifies an act which *prima facie* would be a trespass, he may do so by shewing a title, which would enable him to maintain an action for an injury done to that title under which he justifies. Now, it is clear that the title disclosed in the plea would be sufficient to sustain an action for an injury to the common of the defendant, and it is therefore sufficient to justify his act done in respect of that right. Since the statute *West. 2*, c. 25, (13 *Ed. 1*), the writ of *novel disseisin* would lie in respect of this common, by a tenant for life. That statute directs that in all cases, according to the customed manner, the writ shall be *de libero tenemento* (a), and, as before times, it hath lien and holden place in common of pasture, so shall it henceforth hold place in common of turf land, fishing, and *such like commons*, which any man hath appendant to freehold, or without freehold by special deed, at least *for term of life*.

(a) 2 Inst. 412.

All the old authorities establish that this right may exist in a tenant for life, but it is not upon this occasion necessary to contend to that extent, for if the estate, with its appurtenances, be well conveyed to the tenant, he would have the right as appurtenant to that estate *quasi de libero tenemento*, and may enforce it. Bare possession would be sufficient for that purpose; for an action of trespass will lie at the suit even of a tenant at will. The defendant claims not merely as a commoner, but under the particular statute by which this right is made dependant upon the common of pasture, and that being abridged by the inclosure, this is given without stint in lieu of that. If in the exercise of this right the defendant has been guilty of an excess, that fact should have been traversed. Estovers can only be annexed to a dwelling-house, but common of pasture cannot be annexed to a dwelling-house alone; and therefore, inasmuch as the right of cutting turves is made to depend upon a right which may exist without a dwelling-house, the extent of that right cannot be restricted to the wants of the dwelling-house, and must therefore be without stint.

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Coleridge, in reply, was stopped by the Court.

ALEXANDER, L. C. B.—It is necessary in the first place to dispose of the construction of this act of Parliament. The main object of the statute seems to be, to enable certain persons to exercise rights of which they formerly were in possession, without paying those fees which before had been required of them. The persons to have this benefit are pointed out in this statute, from the words of which I should understand, that, to entitle the parties to the right of cutting turves, without paying fees, it was necessary to unite the two rights of common of pasture and of cutting turves. But, at any rate, it could not be the intention of the legislature to give to those who had not

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the right of pasture, the right of cutting turves; and therefore those only who have the former, can, under this provision, be entitled to the latter. If the defendant had such a right, he was bound to state it legally, and in the common form of pleading; but he has not done so in this case, and therefore I think that the judgment should be for the crown.

GARROW, B.—The object of the statute was to supply timber for the navy, and to enable the crown to make inclosures for the cultivation of that timber. The necessary effect of this would be to abridge the right of those who had a common over the whole, in consequence of which a *bonus* was given by the abolition of fees. The statute, however, conferred no new rights, but merely regulated the existing rights of those who had common of pasture, within which class the defendant does not by his pleadings bring himself.

HULLOCK, B.—I am of the same opinion. It might be questionable, upon the act of Parliament, how far a right of common of pasture would justify the defendant in cutting turves, but, in order to raise that question, he was bound to state that right, the foundation of his claim, in a legal and technical form. The well-known distinction between declarations in case, and pleadings in trespass, is well established, and it is only in comparatively modern times that actions founded upon possession have been introduced in their present form. In *Co. Litt.* 113 b, it is said, in the common law a prescription which is personal, is, for the most part, applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath: as, taking one example for many:—*J. S.* seised of the manor of *D.* in fee, prescribeth thus, that *J. S.*, his ancestors, and all those whose estate he hath in the said manor, have, time out of mind of man, had, and used to have, common of pasture in such

a place &c., being the land of some other &c., as pertaining to the said manor. Since which time it has been the uniform practice, in a plea justifying under a right of common, to set out the title to the common specially, by shewing a seisin in fee of the land to which the defendant claims a right of common, either in himself, or in some other under whom he derives title, and then prescribe in the *que* estate for the right of common, by shewing the right to be in the party seised in fee, and all those whose estate he has in the land, from time immemorial (a). *Grimstead v. Marlow* (b). And, if the defendant be lessee for years, he must shew the seisin in his lessor, and prescribe in him; for, if he lays the prescription in himself it is bad. *Stringer's case* (c). These are the authorities upon this subject, which have never been departed from; but, in order to excuse himself from the effect of this rule, it is said by the defendant that an assise of *novel disseisin*, or an action founded upon his possession, might be maintained. That may be so, for the distinction between the two is well known, and the only question here is, whether making the right of common the foundation of his claim, he has stated that right legally. I am clearly of opinion, upon these authorities, that the plea is bad, and have searched in vain to find any precedent which at all resembles it. With respect to the construction of the statute, it was incumbent upon the defendant to shew, in a legal form, the existence of that right which was the basis of his claim. But, assuming the plea to be good in this respect, for argument, still the statute must be construed with reference to the acknowledged rules of law upon this subject. Was a right of turbary ever pleaded without restricting it to the necessities of the dwelling-house in respect of which it is claimed? It is said to be unnecessary here to shew the origin of the right, or the limit within

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(a) 1 Wms. Saund. 346 (n. 1).

(b) 4 T. R. 718.

(c) Cro. Car. 599.

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which it is to be exercised, inasmuch as the right is made to depend upon a common of pasture which cannot be annexed to a house. But can any one doubt that the act which is to regulate the right, confines that right to those who before had it, and entitles them to exercise that right for the necessities of their houses merely. It is true that no express restriction is imposed by this statute; neither is there any apparent limit to common of pasture *sans nombre*, yet the latter in contemplation of law is limited by the levancy and couchancy of the cattle upon the land; and upon the same principle this right must be restricted to the exigencies of the dwelling-house. Is not that the true legal construction of the act, and ought it not to be adopted in preference to that which would permit any individual to get the whole for sale? A construction attended with such consequences, ought not, in my opinion, to be admitted for a moment.

VAUGHAN, B.—I am of the same opinion, and think that this plea is substantially bad. The rule upon this subject is clearly laid down in a note to *Williams's Saunders* to the case of *Mellor v. Spateman*, 1 Saund. 346, where all the authorities are collected. But I do not read this act of Parliament as conferring any new or enlarged rights, but merely as regulating and confirming such as before existed. In my opinion, it merely regulates and secures the old common law rights, and therefore the claim must be pleaded as such. The construction contended for would go to the destruction of the common. For this reason, a plea of a custom to take turf from the waste of a manor, to make and repair grass-plots in the gardens, parcels of the customary tenements, was held to be bad, as being indefinite and uncertain, and destructive of the common. *Wilson v. Willes* (a). And upon the same principle it was held

(a) 7 East, 121; S. C. 3 Smith, 167.

to be necessary, in pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, to allege that the house was out of repair, that the sand and gravel were necessary for the repair, and used for that purpose. *Peppin v. Shakespear* (a).

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Judgment for the Crown.

(a) 6 T. R. 748.

THE KING (in aid of HOLLIS), v. BINGHAM.

SCIRE facias upon a recognizance returned and filed as of record. The defendant, by his plea, set out the recognizance which was entered into by himself and three sureties in the sum of 1731*l.* 10*s.* 6*d.*, subject, at the time of the making and enrolling thereof, to the following condition:—Whereas, by an order of our Court of *Exchequer*, made on the 9th day of *July* instant, in several matters of extent—respectively intituled, The King, in aid of *George Hollis*, against the Rev. *Richard Bingham*, Clerk; the same against *Hawkins*; and the same against *Elliott* and others,—after reciting an agreement entered into between the said parties for referring all matters in difference between the prosecutor of the said extent and the first-named defendant, and between the said prosecutor and the defendants in the two other causes, or either of them, to the award of Mr. *Denman*; and whereby it was agreed, that the defendant in the first cause should immediately give security to the satisfaction of the deputy remembrancer of this Court, in the sum of 865*l.* 15*s.* 3*d.*, to abide the event of the said award; it was (amongst other things) ordered, that the said agreement should be, and the same was thereby, made an order of this Court, and that the several parties thereto should, in all things, abide by, fulfil, and perform the same; and it was thereby referred to the said deputy remembrancer, to consider of the

The condition of a recognizance, returned, filed, and enrolled as of record, cannot be varied by a rule of Court.

Where *A.* entered into a recognizance to pay to the King a certain sum, or such sum as *B.* should award; and afterwards by rule of Court *C.* was, by consent of parties, substituted as arbitrator in lieu of *B.*, and *C.* made his award: *Held*, that the recognizance was not forfeited by the non performance of the award of *C.*

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12 M. & W. 446.

6 Man. Rep. 689.

2 Man. Rep. 740.

1 L. & J. 1879.

sufficiency of such security, and, if sufficient, to approve of the same: and that the persons so approved of should forthwith enter into a recognizance to his Majesty, in the penal sum of 1731*l.* 10*s.* 6*d.*, with a condition to make the same void upon payment of the said sum of 865*l.* 15*s.* 3*d.*, or such sum (if any) as should be awarded by the arbitrator in the said order named, and, on such security being given, that a writ of *amoveas manus* should issue to amove his Majesty's hands from the property seized under the said extent: now, therefore, the condition of this recognizance is such, that, if the above-bounden *Richard Bingham*, and his sureties, or any or either of them, their or any or either of their heirs, executors, administrators, or assigns, shall pay into our said Court of *Exchequer*, in trust in the said matters of extent in the said order mentioned, the said sum of 865*l.* 15*s.* 3*d.*, or such sum (if any) as shall be awarded by the arbitrator in the said order named: then this recognizance to be void, otherwise the same shall be and remain in full force and virtue. He then pleaded, that no award had been made by the arbitrator. The replication stated, that, after the making of the recognizance, and during the continuance of the authority of the arbitrators, to wit, on &c., by a certain rule of Court, then and there made, it was ordered by the Court, by the consent of the prosecutor and the defendant, that Mr. *Merewether* should be appointed the arbitrator in lieu of Mr. *Denman*, who had not been able to take upon himself the reference, and that Mr. *Merewether* had made his award, finding that there was due from the defendant to *Hollis* the sum of 861*l.* 16*s.* 2*d.* To this replication there was a general demurrer, and to that a joinder in demurrer (a).

(a) The questions suggested in the paper books for the consideration of the Court, were as follows:— On the part of the crown, it was insisted that the defendant, having assented to the substitution of Mr.

Merewether for Mr. *Denman*, as referee, could not set up the circumstance of no award having been made by Mr. *Denman* as a discharge from the recognizance; secondly, that the making of an award by Mr.

2 L. & J. 130.

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Dampier, in support of the demurrer. It is a general rule, that instruments can be varied or defeated by instruments of equal degree only. This rule is applicable to all classes, but more particularly to records which are attended with all the solemnity and importance of a decision of a court of justice. Were it otherwise, instruments which import consideration from the ceremony and deliberation in the confection of them, might be varied or defeated by parol, whether orally or in writing, which, in the language of Lord *Bacon*, the law adjudgeth too light to give an action without consideration. *Bacon's Uses*, p. 13. *Plowd.* 308 b. *Pillans v. Van Mierop* (a). Now, a recognizance is an obligation of record of the highest security, and binds the lands of the conusor from the time it is entered into. The question, therefore, is, whether the rule of Court is a record. According to the definition of Lord *Coke* (b), a record is a memorial or remembrance in rolls of parchment of the proceedings or acts of a Court of justice; the rolls being the records or memorials of the judges of the Courts of *Record*, import in them such uncontrollable credit and verity, as they admit of no averment, plea, or proof to the contrary. To be a record, the rule of Court must therefore be enrolled of record, and must be pleaded as such. In the case of *Glynn v. Thorpe* (c), to an action of *assump-*

Denman having become impossible, the defendant could not save the penalty without performing the other alternative proposed, viz. payment of 865*l.* 15*s.* 3*d.*

For the defendant, it was insisted that the recognizance, being matter of record, could not legally be varied in the manner stated in the replication, and, consequently, admitting that the award of the substituted referee might be enforced in some form against the defendant, still it could not be enforced against him by

suit on the recognizance; secondly, that there was nothing in the pleading to shew that it was even then impossible for Mr. *Denman* to make an award in the premises; and that, at all events, as that condition was possible, at the time of the defendant's entering into the recognizance, he ought not, by law, to be fixed with the penalties, by reason of its having become impossible.

(a) 3 Bur. 1663.

(b) 1 Inst. 260 a.

(c) 1 B. & A. 153.

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sit on bills of exchange, the defendant pleaded that the plaintiff was indebted to him, by virtue of a recognizance in the Court of *Exchequer*, which was still in force, as, by the said recognizance, remaining in the said Court before the Barons, would appear, without stating that it was enrolled: the replication concluded to the country, and, upon special demurrer, it was held that the replication was good, inasmuch as a recognizance is not a record until enrolled. A question arose in the case of *Wigley v. Jones* (a), whether a writ of *habeas corpus* and the *committitur* deposited with the clerk of the papers of the *King's Bench* prison, were records sufficient to satisfy an averment in the declaration of *prout patet per recordum*. The Court decided that they were not records, or capable of being so, although they might be *quasi* of record sufficient to satisfy the averment in the declaration. It is true that, during the same term, the records are supposed to be in the breast of the Judges, and that, according to the ancient practice, they were, at the end of the term, carried by the junior Judge to be enrolled. Upon this supposition, it may be contended, that, for aught that appears, the substitution of the arbitrator was made during the same term; but to this hypothesis there are two answers. In the first place, if that were so, it should have been pleaded; and, in the second, had the record been so altered, it would, when varied, have formed but one record, and no alteration or substitution should have been stated. Granting that the rule of Court is a record, it would not affect a previous subsisting record, which nothing but an act of Parliament can touch. But, even if it be a record sufficient for that purpose, the pleadings are defective; for, in that case, no allusion should have been made to the original arbitrator, whose authority, according to the argument, was determined; but the *scire facias* should have been founded upon

(a) 5 East, 440.

both records. The impossibility of framing the *scire facias* under such circumstances, shews that no proceeding is maintainable. The consent of the parties is also imperfectly alleged; for the consent should, in any view of the question, appear of record. *Beston v. Robinson* (a). The proceedings are also defective in not shewing that the original arbitrator may not make an award, in which event the defendant and his sureties, who will be bound by this recognizance, may be called on to perform another award.

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Manning, contra.—It is clear, from all the older authorities, that a rule of Court may be a record, although it be not enrolled of record. Thus, in *Co. Lit.* 260 a, it is said, “during the term wherein any judicial act is done, the record remains in the breast of the Judges of the Court, and in their remembrance, and, therefore, the roll is alterable, during that term, as the Judges shall direct; but, when that term is past, then the record is in the roll, and admits of no alteration, averment, or proof to the contrary.” From this it is manifest that, before enrolment, the judicial act of the Court is a record; but there are several cases in which that proposition is distinctly laid down. In *Paul v. Winckfield* (b), an action of debt was brought upon a recognizance taken before the Chief Justice, in *Serjeants’ Inn, Fleet-street*, laying the venue in *London*, and, upon a demurrer to the declaration, it was agreed, that, though it were not a perfect record till it were entered upon the roll, yet, when it was entered, it is a recognizance from the first acknowledgment, and binds persons and lands as a record from that time; for it is the acknowledgment before the Judge that gives it the force of a record, though the enrolment be necessary for the testimony and perpetuating of it. So, it is said, a fine is a record, *though it be not engrossed*, and shall be executed,

(a) Cro. Jac. 218.

(b) Hob. 195.

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and a *quid juris clamat* lies upon it, *Br. Record*, pl. 78. For this is cited M. 22 H. 6, fol. 13, *per Newton*, "although a fine be levied and not engrossed, still it is a fine, and remains of record to this intent, to be executed afterwards as thoroughly as if it had been engrossed; and so divers fines are executed in this place, which were never engrossed. But, after the fine is engrossed, it is not proper for the party to sue *quid juris clamat*; but he shall not make avowry, nor punish waste, if action is made without attornment; but, before the fine is engrossed, he shall have *quid juris clamat* to compel the tenant to attorn, for, without attornment, the waste shall be dispunished; and this was affirmed by all the Court. So, it seems, that it is not necessary to make mention, in the writ of *mittimus*, in what term it is engrossed; for, when we are seised of the fine, we have sufficient to warrant us to award *scire facias*." Another instance is stated in *Br. Exigent*, pl. 32, as follows:—An *exigent* is a record, *though it be not entered* on the roll. 38 H. 6, fol. 1, pl. 3. In *Barns v. Eyles* (a), upon a special demurrer to a declaration for an escape, against the Warden of the *Fleet*, which averred that the defendant had been brought up and committed in execution, as by the commitment more fully and at large appears, *Gibbs*, Chief Justice, said, the plaintiff has alleged that the prisoner was brought to the bar of this Court, by the defendant, by virtue of a writ of *habeas corpus*, and, at the request of the plaintiff, was, by the same Court, re-committed to prison, for certain damages recovered against him, &c., as by the commitment more fully and at large appears. This Court can only act by record. The plaintiff, therefore, having stated that the party was re-committed by the Court, as appears by the commitment, it must be inferred that such commitment must be by order of this Court, which *of necessity must be a record*. It

(a) 2 B. Moore, 561.

is true, that, in the case of *Wigley v. Jones*, it was holden that a *committitur* was not a record, but the ground of that decision was the difference in the practice of the Courts of *King's Bench*, and *Common Pleas*, for, in the case of *Turner v. Eyles* (a), the latter Court decided, under similar circumstances, that evidence of a commitment by a judge of the Court of *King's Bench* was not sufficient. But the proceedings by original are free from that objection. The original writ always remains with the *custos breviarum*, and forms no part of the proceedings; yet, if any question arises upon the writ, the defendant must plead *nil tiel record*, although it is no otherwise a record than by being filed. These different authorities establish that a rule of Court is a record, but the prosecutor is by no means driven to contend to that extent. The order is pleaded as a rule of Court, and is entitled to all the authenticity of the solemn act of the Court. It is laid down in 12 *Mod.* 229, *per Holt*, Chief Justice, that a record of a judgment is defeasible by bond or deed. Again, in *Bro. Recognizance*, pl. 11, it is said, "a recognizance may be acknowledged upon condition, but if it be acknowledged simply, and after they will have condition, this cannot be, but they may make thereof defeazance by writing, and this may serve as well as a condition would do, *quod nota*; and it is so in use." The authority referred to in support of this position is, 36 H. 6, fol. 6, pl. 2, *per Prisot*.—"If a recognizance be simple here before us; if the parties will come at another day, and will make a condition, the Court ought not to receive it, because they have received a recognizance simple which afterwards cannot be made conditional, because it is a judgment; and when we have given a simple judgment, although the parties should pray us to enter it conditional, that we cannot do, because we have given a judgment which we cannot change. And so it is of a recognizance, and therefore the parties in such a case

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(a) 3 B. & P. 456.

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ought to make such a condition by way of defeazance, and not otherwise." So it is laid down, 1 *Roll. Abr.* 590, *De-feazance (D)*: if a defeazance of a statute be made, and after another defeazance is made, the first defeazance is made void thereby, and the second only in force, as in a will. Again, a new defeazance may be made to an obligation with condition, but then it must be by writing; agreed *per Cur. Mo.* 573, pl. 789. *Hil.* 41 *Elis.* in case of *Holford v. Andrews*. From these authorities it may be collected, that it would have been sufficient had the parties consented by deed to the substitution of an arbitrator; and if that be so, the substitution must be of equal authority, and equally binding where the Court is made a party to the substitution, and the consent is embodied in a rule of Court. The penal part of the recognizance upon which the *scire facias* is founded, remains the same, notwithstanding the alteration of the defeazance; but it is true that, by the substitution, the sureties are discharged and cannot be proceeded against. After the distinct revocation of his authority, no award can now be made by the first arbitrator, and therefore the parties cannot be called upon to perform two awards. But, supposing the present award to be void, still the defendant is liable upon the recognizance. As in the case of a reference at *Nisi Prius*, where a verdict is taken subject to an award, the Court will permit the plaintiff to enter up judgment upon that verdict, if the defendant will not proceed with the reference, so here the words "if any" do not mean that the recognizance shall be vacated if no award be made, but that the defendant shall pay the sum awarded, if any be awarded against him, and he can only save the penalty by performing the other alternative, *vis.* the payment of the sum awarded.

Dampier, in reply.—The argument, with respect to the penalty, proceeds upon an assumption that the authority of the original arbitrator has been legally determined, but, if that were so, all argument would upon that point be

unnecessary, for the defendant would be liable in respect of the award. The question, therefore, is simply as originally propounded:—has the condition of the recognizance been legally altered? It has not, because the rule of Court is not a record, and, if it be, is not pleaded as such. Admitting the authorities which have been cited to establish that the substitution might have been made by deed, still the rule of Court is not equivalent to a deed, but is of no higher authority than an order of *Nisi Prius* in a matter over which that Court has jurisdiction, and which may be revoked by parol.

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ALEXANDER, L. C. B.—I should be very sorry if this case were decisive of the merits between the parties, because there is no doubt that the prosecutor should have the benefit of the award. There are some views of this case with respect to which I feel a little difficulty, but I collect from the argument that it is necessary for the prosecutor to establish that this rule of Court is a record, and that, if that be not made out, the defendant is entitled to the judgment of the Court upon this demurrer. The counsel for the prosecutor, notwithstanding his elaborate argument, has failed to satisfy me of that point. I cannot view that as a record which is a mere order of the Court, and which the Court is in the constant habit of re-moulding; and therefore, I am of opinion, inasmuch as that must be established in order to form the basis of the argument, that the demurrer must be allowed.

GARROW, B., was of the same opinion.

HULLOCK, B.—In concurring in the judgment which has been delivered, I proceed upon the failure of the position which it was necessary for the prosecutor to establish in order to succeed upon this demurrer. This is a *scire facias* upon a recognizance returned and filed as of re-

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cord with the King's Remembrancer, and, as appears from the plea, enrolled, and therefore a perfect record upon every principle of law. The plea sets forth the condition—I do not stop to consider the argument upon the effect of the alternative condition—and then alleges that the arbitrator has not ever awarded any sum of money to be paid by the defendant. Suppose that the arbitrator had never been substituted, and that the gentleman originally appointed had made an award which in point of law was insufficient; the language of the plea would, in that case, have been the same as in the present, and it would have been incumbent upon the prosecutor to have shewn that the award was valid. It is equally incumbent upon him to shew that the award of the substituted arbitrator is good, or, in other words, he must shew that he had an authority to arbitrate between the parties. To this plea the replication states, that a new arbitrator was substituted in lieu of the former; and the non-performance of his award being suggested as the breach of the recognizance, the prosecutor must shew that that award was made in conformity with the condition. The question, therefore, which arises is, whether the non-performance of the award of the latter is a breach of the condition to abide by the award of the former. Coupling the allegations in the pleadings together, it is manifest that this recognizance is a record, and has been enrolled as such; although there are authorities to shew that it would be sufficient if it were only filed with the proper officer, and not enrolled. Now, the recognizance in question appears to be filed with the King's Remembrancer, who is the proper officer to have the custody of such documents, which would perhaps be alone sufficient; for, in the case of *Beal v. Langstaff* (a), in which an application was made to take an affidavit off the file which had been read, the Court said, it has been read, and is now filed and become a record of the Court,

(a) 2 Wils. 371.

and cannot be taken off the file. It is not necessary, for the purpose of making it a record, that it should be engrossed on parchment, but the filing of it would, I apprehend, be sufficient for that purpose. That is manifest from the case of *Cooper v. Jones* (a), in which the Court of *King's Bench* refused to compel the Marshal of that Court to affile of record a writ of *habeas corpus cum causa*. The difference between the practice of the Courts of *King's Bench* and *Common Pleas* also shews that it is not necessary that the recognizance should be spread upon parchment to become a record. In *Shuttle v. Wood* (b), *Holt*, speaking of a recognizance of bail, says, in the Court of *King's Bench*, the course is always to enter them as taken in Court, though taken actually by a Judge in his chambers; and in this Court they are not taken in a sum certain, as in the *Common Pleas*; neither are they a record till entered: but, in the *Common Pleas*, it is a record immediately upon the first caption, and binds the lands before it is filed at *Westminster*, and, when it is filed, then it is a record in Court, and a *scire facias* or debt lies upon it, either in *Middlesex*, where filed, or in *London*, where taken; whereas, on a recognizance in this Court of *B. R.*, the action or *scire facias* must always be brought in *Middlesex*. This reasoning is not at all impugned by the decision in the case of *Glynn v. Thorpe*; for that question turned entirely upon the language of the plea, and the Court merely held, that, inasmuch as it was not pleaded as a record, a conclusion to the country was good in the replication. The question there was, whether a recognizance was of necessity a record. A similar question arose in the case of *Bottomly v. Lord Fairfax* (c), upon the effect of a recognizance which had not been enrolled, and the Court decreed that it would have the effect of a bond merely. But, in that

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(a) 2 M. & S. 202.

(b) 1 Salk. 564.

(c) 2 Vern. 750; 1 P. Wms. 334.

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case, the recognizance was not enrolled; whereas, in the present, it is distinctly alleged upon the *scire facias*, that the recognizance was returned and filed as of record, and the plea shews that it was enrolled, and I am not aware that it ought to be filed in any particular place. But the whole ground of argument is, not that the recognizance is not a record, but that the rule of Court is also a record. If the recognizance be a record, how can it be avoided, except by matter of record? With respect to the decision of Lord Chief Justice *Holt*, than whom few more able lawyers ever sat in *Westminster-Hall*, it is uncertain under what circumstances, and as applicable to what state of facts, that *dictum* was delivered. It may be good in point of law, if applicable to a particular state of facts. As, for instance, a judgment may be defeated by an instrument which estops the party from disputing the effect of it; but, in a case like the present, the Court would be slow to decide that a rule of Court was a revocation of this instrument. In *Grieg v. Talbot* (a), the Court of *King's Bench* decided that where a bond was given conditioned for the performance of an award within a limited time, the time might be enlarged by deed; but the ground of that decision was (and all the authorities now cited were referred to) that an instrument may be varied by one of as high a nature. To bring this case within that authority, it must be shewn that a rule of Court is of as high a nature as a record. Now, the argument for the prosecution has satisfied me that a record is of such high authority that, after the term in which it is pronounced, it cannot be altered, even by the Court from whence it proceeded; but it is well known, that, in whatever term a rule of Court is made, provided any difficulty arises from the form of the rule, the Court are in the daily habit of interposing, and altering or setting aside that rule. A rule of Court is not a record, but only a remembrance. *Wynne v.*

(a) 2 B. & C. 170.

Wynne (a). If, then, the recognizance be a record, and the rule of Court be not a record, this case falls precisely within the principle of that of *Brown v. Goodman* (b), in which a bond having been given to abide by an award to be made within a limited time, the time for making the award was enlarged by consent of both parties; and upon demurrer Lord *Kenyon* said, the question is not whether the party has some remedy, but whether his remedy is upon the bond; to determine which, the Court must look to the bond; and there it appeared that the defendant had bound himself to abide by an award under a penalty, if made within a given time: but that can never extend the penalty to an award made after that time under a new agreement. The same principle is laid down in *Little v. Holland* (c), and the case of *Evans v. Thompson* (d), which at first sight appears to militate against this proposition; will, upon examination, be found to proceed upon the same principle. But that question arose upon an attachment, and may therefore be laid out of consideration in this case. Upon these grounds, I am of opinion, that the demurrer should be allowed, the recognizance being a record, and the rule of Court an instrument of an inferior nature.

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VAUGHAN, B.—Concurring as I do in the judgment which has been delivered, it will be necessary for me to say but a very few words upon this subject. The rule, that instruments cannot be altered or defeated but by instruments of the same nature, is well established and is peculiarly applicable to a case like the present. That rule was well considered in the case of *Thompson v. Brown* (e), in which the Court of *Common Pleas* decided that another voyage could not be substituted by agreement in lieu of that defined by covenant, without releasing the party from his covenant. The only question therefore is, whether a rule

(a) 1 Wils. 48. See *Lewis v. Morland*, 2 B. & A. 61.

(b) 3 T. R. 592, n.

(c) 3 T. R. 590.

(d) 5 East, 189; 1 Smith, 380.

(e) 7 Taunt. 656.

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of Court is a record. I think that it is not, but of a lower denomination than a record, and that therefore the defendant is released from his obligation, and that the demurrer should be allowed.

Judgment for the defendant.

The ATTORNEY-GENERAL v. HOLBROOK and Another (a).

The forgiveness of a bond debt by will is a legacy, and as such is liable to the payment of legacy duty.

But where a specific sum is bequeathed or a specific debt forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt or sum of money, between the time of such death and the period when the executors close their accounts.

The obligee of a bond, after the death of the principal there-

in, but during the life of the surety, who was his brother, made his will, containing the following directions relative to the bond:—"I hereby forgive the bond debt, both principal and interest, due to me, and entered into by J. W. and my brother J. H.; with and for him, for the said J. W.'s paying me the principal sum of 4000*l.* and interest, at 4*l.* per cent. &c., and do order the said bond, at my decease, to be delivered up and cancelled." The interest upon the bond was paid up to the death of the testator, whom his brother survived: *Held*, that this was a legacy whereon legacy duty was payable by J. H., testator's brother, but upon the principal sum only, and not in respect of interest accruing subsequent to the testator's death.

THIS was an information filed by his Majesty's Attorney-General against the defendants, to recover the amount of certain legacy duty claimed by the Crown from the said defendants, to be calculated at the rate of 10*l.* per cent. on the amount of the principal and interest unpaid on the bond hereinafter mentioned. The defendants pleaded not guilty to the information, on which issue was joined. The information was tried at the sittings after *Hilary* Term, 1823, when a verdict was taken by consent for the Crown, subject to the opinion of the Court upon the following case:

One *Thomas Holbrook*, on or about the 31st day of *August*, in the year of our Lord 1810, duly made and published his last will and testament in writing, bearing date the day and year aforesaid, and thereby, amongst other things, said as follows:—"And moreover, I hereby forgive the bond debt, both principal and interest, due to me, and entered into by *James Willis*, and my brother,

(a) This case was argued in the year 1823. The editors are indebted to Mr. *Trevor*, the solicitor

of the Legacy Office, for the means of presenting it to the profession.

James Holbrook, with and for him, for the said *James Willis's* paying to me the principal sum of 4000*l.* and interest at 4*l. per cent.*, being the appraised value of my late brewhouse, buildings, and premises, thereon, and for the horses, carts, and utensils, and stock in trade, then of me as a brewer, of every description, and do order the said bond, at my decease, to be delivered up and cancelled." And the said *Thomas Holbrook*, by his said will, appointed his brothers *William Holbrook*, and the said *James Holbrook*, both since deceased, and the said defendants, executors thereof: and on the 23rd *August*, in the year of our Lord 1811, died without revoking or altering his said will in respect of the said bond-debt. And the said *William Holbrook* and *James Holbrook*, both now deceased, and the said defendants, in the life-time of the said *William Holbrook* and *James Holbrook* now deceased, duly proved the said last will and testament, and took the burthen of the execution thereof. And the said bond referred to in the said last will and testament was a certain bond or writing obligatory, bearing date the 28th *December*, 1787, whereby the said *James Willis* and *James Holbrook* now deceased, the brother of the said *Thomas Holbrook*, as surety for the said *James Willis*, became jointly and severally held and firmly bound to the said *Thomas Holbrook* in the sum of 8000*l.*, to be paid to the said *Thomas Holbrook*, conditioned for the payment by the said *James Willis* and *James Holbrook* now deceased, or either of them, their or either of their executors or administrators, unto the said *Thomas Holbrook*, his executors, administrators, or assigns, of the sum of 4000*l.* of lawful money of *Great Britain*, on the 1st day of *January*, 1794, with interest for the same from the date thereof, after the rate of 4*l.* for 100*l.* by the year. And interest on the said 4000*l.* was paid by the said *James Willis* to the said *Thomas Holbrook* in his life-time, to the time of the death of the said *James Willis*, which happened in

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the year 1807, and from that time by his executors to the 1st *January*, 1811; and the principal and all interest since due remains unpaid. And the said defendants retain the said bond in their possession for the person entitled there- to under the said will.

The question for the opinion of the Court is, whether or not the principal sum, secured by the said bond, be liable to the said duty on legacies; and if so, whether or not the interest which has accrued due thereon be also subject to the duty, and for what period. If the Court shall be of opinion that, under the circumstances of the case, the Crown is entitled to recover, the verdict shall stand for such sum as the Court shall think is payable by the defendants; if otherwise, a verdict shall be entered for the defendants.

Shepherd, for the crown.—The first question is, whether the forgiveness of a bond debt is such a legacy as is charge- able with the legacy duty, under 36 *Geo. 3*, c. 52; which question, as well as the liability of the defendants, depends upon the 5th and 7th sections of that statute. The for- giveness of a debt, by a will or testamentary instrument, has always been held to be a legacy, and, as such, is sub- ject to all the incidents and obligations which arise on legacies. It cannot be pleaded by way of release. *Wank- ford v. Wankford* (a), *Rider v. Wager* (b). It could not be paid or remitted, if there were not enough to discharge the debts, but would be assets for that purpose; and, although it is a testamentary act, which may be good as against executors, it is not good as against creditors. *Sib- thorp v. Moxon* (c). In *Ashburner v. Macguire* (d), the principal of a bond debt, bequeathed to the testator's sis- ter, was held to be a specific legacy; and, as the cases

(a) 1 Salk. 303.

(b) 2 P. Wms. 330.

(c) 3 Atk. 580.

(d) 2 Bro. C. C. 108.

before cited shew that the forgiveness of a debt is a legacy, it follows, of necessity, that the forgiveness of a bond debt to the obligor thereof, is as much a legacy as if it had been left to a third person. The second point, supposing it to be established that this is a legacy, relates to the question whether, in consequence of the death of *Willis*, the legacy has not lapsed. Upon this, however, it is contended, that the legacy is either to *Willis* alone, and survives to his personal representatives, or it is at once given to those substantially interested in his property; or, in the event of its not being a legacy of that nature, that it did not lapse, but survived to the joint obligor, *James Holbrook*. The cases relative to lapsed legacies are all distinguishable from the present; but, from them, as well as others to the contrary effect, it may be collected, that, if it can be seen from the words of the will, or from facts stated in the case, that the testator did not intend the legacy to lapse, full effect will be given to the will. *Sibley v. Cooke* (a); *Budge v. Abbott* (b); *Ixon v. Butler* (c). An important fact here is, that *Willis* died before the testator made his will; and, therefore, it must have been intended that the legacy should not lapse, or rather that the debt should be discharged to his representatives, who were absolutely and ultimately liable to pay it. The words "to be given up to be cancelled," seem also to have been considered by Lord *Hardwicke*, in *Sibthorpe v. Moxon*, as of some importance, and are no less material in the present instance, as pointing out the parties intended to be benefited. Yet, supposing the legacy not to operate in favour of the legal representatives of *Willis*, still, from the circumstance of the testator's intention, and the general principle that a legacy given to two jointly survives to the survivor, the duty is payable, treating *James Holbrook* as the legatee. Upon the question of interest, it may be submitted, that the duty is to be

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(a) 3 Atk. 573.

(b) 3 Bro. C. R. 226.

(c) 2 Price, 34.

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received from the legatee, upon the amount of the whole sum he receives in consequence of the legacy. In the *Attorney-General v. Lord George Cavendish* (a), it was held, that the legacy duty is payable upon the aggregate amount of the residue of the testator's property at the time of the executor's delivering into the Stamp-office the note of what he intends to retain, as residuary legatee; and it was there decided, that interest, as forming part of the residue, is liable to duty. Upon the same principle ought all the beneficial interest received by a legatee to be made liable to the payment of duty; especially since the duty, and the interest upon it, is lost to the crown during any delay that takes place in the administration of the testator's effects.

Peake, Serjeant, *contra*.—Upon the authority of *Sibthorpe v. Moxon*, it might be contended that this was a mere release of the bond, and not a legacy chargeable with duty; but, inasmuch as that case has been considerably shaken by subsequent decisions, and particularly by that of *Ixon v. Butler*, the argument need not be carried to that extent. It is sufficient to distinguish the present case from *Sibthorpe v. Moxon*, and others upon the same point down to *Ixon v. Butler*, that, in all those cases, the bequest or release was to one person, whereas, here it is a forgiveness and remission of debt in general. Conceding, however, that this is to be taken as a bequest, still, according to the rule, that where there is a bequest to two or more persons of one general sum, undivided by the testator, it will not lapse but go to the survivor, the bequest in this instance would go to *James Holbrook*. This is clear from *Buffan v. Bradford* (b), and a variety of other cases, as well as from the fact, that, at the time when the testator made his will, *Willis*, the principal obligor in the

(a) Wight. 82.

(b) 2 Atk. 220.

bond was dead, and, therefore, the surety alone was intended to be benefited; and he being a brother, if any duty be chargeable, it must be in reference to that relationship. Upon the main question, whether any duty whatever be in this instance payable, it may be submitted that the remission of a bond debt in this manner is not within the words of the statute. The statute 44 *Geo. 3*, c. 98, applies only to cases where a receipt or discharge is to be given by legatees to the executors, and not to those where the act to be done, as the cancelling of a bond, or delivering it up to be cancelled, is to be done by the executor himself. In this respect, the 45 *Geo. 3*, c. 28, s. 4, does not materially differ from the preceding statute. The omission of the legislature to impose a duty in cases of this nature, may be well conceived to have been intentional and not accidental. A creditor by bond, who stands nearly related to the obligor, knowing that he is unable to discharge the debt except in his person, may wish to release him altogether from his obligation, without leaving him to the mercy of executors. The payment of a legacy duty by such a legatee may be equally impossible, and, therefore, to call upon him to make such payment, in the same manner as if a sum of money to the amount of the debt forgiven had passed into his hands, would be attended with extreme hardship. The duty imposed is by way of stamp on the receipt and discharge to be given by the legatee to the executor; and the executor is liable to a penalty unless he take such a receipt or discharge. The cases in which interest has been charged do not apply, as they related only to residue, or where the party himself had been making interest, or the interest had become principal.

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GRAHAM, B.—I feel no difficulty with respect to the manner in which this will is worded, expressly forgiving this bond debt. At the date of the testator's will, these

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two persons, *James Holbrook* and *Willis*, had given a bond of an anterior date, and it is perfectly clear that the testator must have known that *Willis* at that time was dead; and therefore this testator, when he uses the expression, "I forgive the bond debt entered into by *Willis*, and my brother, *James Holbrook*," meant it merely as descriptive of the nature of that instrument, by which the parties were bound; he recognizes, therefore, or uses, those expressions merely as descriptive of the nature of that bond which he wished to forgive; then, if he forgives that bond, he could only have in contemplation the person in whose favour this would operate, namely, his brother *James*, and to release him from all obligation he owed in the shape of the bond primarily, though he was only a security. I cannot conceive he could have any other object in view than his brother *James Holbrook*, where he says, I forgive that bond, he at that time being a person that unquestionably was bound to pay this money if the testator had called upon him. It is said this is not within the purview of this act of Parliament, because it is not a legacy. What was this debt? It was so much money in the hands of the testator which they were bound to pay him; it is as much as to say, I give you the amount of that debt, my money, in the hands of you the persons who have entered into that obligation to me; and therefore I can form no doubt at all that the remission of a debt that is due to the testator, is to all intents and purposes a bequest of so much money to the party, and must be so considered; the words of the different acts of Parliament are large enough to comprehend the case of the forgiveness of a debt. If that be really the case, I conceive there is no further question in the cause. If this was the remission of a debt due from *James Holbrook*, he derives all the benefit from it, and I cannot conceive, in any point of view, that the representatives could be called upon, on the present occasion, because, if this is the remission of a debt as

to *James Holbrook*, he could never bring any action for any injury he sustained, against the representatives of *Willis*; that appears to me to be perfectly clear, and, that being so, I do not see that by any means, in any view of the case, the representatives of the testator could be affected. If *James Holbrook* was to say, "as to you, the representatives of *Willis*, there is no remission of the debt," and were to sue them, it is perfectly clear that the representatives would find relief either at law or by the assistance of a Court of Equity. That being the case, it appears to me that there is no person who could be affected by a perfect remission of this debt, but the person himself who remained bound by the effect of this bond; and that he, being cleared of a debt of 4000*l.*, received so far a benefit, by being released from an obligation to that extent. Under these circumstances it appears to me to be extremely clear, that he is chargeable with this bequest to the extent of 4000*l.*, and, being a brother, that he is liable only to the lesser duty. As to the question of interest, I cannot entertain any degree of doubt about it. Nobody knows what the extent of the residuary fund is till the debts are perfectly clear and satisfied, and then whatever that is composed of, forms part of the *corpus* of that legacy, given in the shape of a residuary bequest; but where a sum is secured by an instrument which renders it specific, we are to consider it at the time of the death of the testator, and at that time whatever interest was due comes into the pocket of the legatee: but it appears in this particular instance, that all arrears of interest were paid. Then again, in the case of a simple bond, a sum of money is appropriated to the legatee, it is his from the time of the death of the testator, and being his at the time of the death of the testator, if it has produced any interest subsequent to that time, it is the consequence of the property having attached to him at the time of the death of the testator, and does not form any part liable to duty. Under these circumstances, I think the verdict must stand

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for the crown to the extent of the legacy duty payable by a brother.

GARROW, B.—This case comes for the consideration of the Court upon an information filed by his Majesty's Attorney-General against *Thomas Holbrook* and another, claiming legacy duty upon the sum of 4000*l.* given to a person of the name of *James Willis*. The benefit was given in the shape of the forgiveness of a bond entered into by *Willis*. *James Holbrook* was his security. *Willis* died in the life-time of the testator. I am of opinion the crown is entitled to recover. The testator says that he forgives the bond-debt, both principal and interest, amounting to 4000*l.*, which had been secured by a joint mortgage; and I consider the case upon the question, whether this is a legacy or not, just as if the testator had done this sort of thing, as if he had said I give to my brother 4000*l.* in exchequer bills, which are sealed up at my bankers, they shall be given up to him at my death; then he says, this is in effect in order to shew my affection and regard to my brother, and to benefit him to the extent of 4000*l.*; I do not direct it shall be paid to him, I do not desire it to be paid to him, because I have a security from him to that amount, and I desire that it may be done in this way, that the bond be cancelled, and he will be 4000*l.* better in the world than he would if that bond remained uncanceled and unrevo-
ked. I am of opinion that this is a legacy to the brother of the testator, and therefore liable to the payment of duty to the amount which is charged upon persons standing in that near relation. I am clearly of opinion, there is no pretence to charge any interest, for the interest had been paid up to the time of the death of the testator; and this is clearly distinguishable from the case alluded to, of a charge upon the residue of the estate; that would be made up, part of it at the time of the death of the testator, and a much larger part of debts outstanding;

all going to make one aggregate fund: upon which therefore it was perfectly easy and competent to make a charge at the rate of the legacy duty. What interest has been received, has resulted from the testator's estate; not one single farthing has the executor himself made. It is a legacy of 4000*l.* not in bank-notes, or in exchequer-bills, in the way I put, but by directing over 4000*l.* in the shape of a bond, which might be enforced to its full extent. I am of opinion, the Crown is entitled to a verdict for the amount of the legacy duty payable by a person standing in the relation of a brother.

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HULLOCK, B.—Concurring, as I do, in opinion with the rest of the Court, it will not be necessary for me to occupy much time; but the case has resolved itself into three questions: first, whether this bequest amounts to a legacy? in the next place, if it be such a legacy as is subject to any duty, then the question will be as to what duty? and then the third question is, whether or no interest is due; whether it can be considered as due upon a debt released at the time of the death of the testator? As to the first question, it is rightly conceded that the cases were brought in review before the Court, in *Ison v. Butler*. It is too much to argue for a moment, with any hope of success, that this does not amount to a legacy, and it is partly so conceded; that is the case brought before the Court at that time, which appears to have gone a great way; but it cannot now be argued, that it is not a legacy. Then, assuming it to be a legacy to the survivors of the principal in the bond, it is totally immaterial whether *Willis* died before the making of the will or not; but, in fact, he was dead; therefore, the devise operated for the benefit of the survivors. Then, assuming it to be a legacy to him, it is said by the 4th section of the 45th of the late King, c. 28, the object of which was to ascertain what legacies were subject to the receipt duty—what legacies were bound to pay any sum to the executor in the shape of a receipt-

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stamp—it is said, although the fourth clause comprehends the case in question, it does not comprehend a legacy liable to the receipt-duty. Now, the first point will be to ascertain, whether it falls within the words of that clause, which enacts “That every gift,” there is no question this is a gift, “by any will or testamentary instrument, of any person dying after the passing of this act, which, by virtue of any such will, or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying,” about which there can be no question—this debt is to have effect, or be satisfied out of the personal estate of such person so dying,—this debt was part of the personal estate, and would have been assets, “or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon”—and then it goes on comprehending the charges upon real estates, “which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act.” Now, it appears to me, this must be construed, as the Court are disposed to construe it, to be a legacy, and that it is a legacy which acquires its force and effect under this will. If it be so, then it falls within the former part of the clause, and becomes a legacy, and subject to the duty. The question is, whether it be or be not a legacy within this act: it appears to me, that it is; and that, therefore, it is liable to the duty—that is, the duty imposed upon the legatee; then, with respect to the hardship which, it is said, will result from that construction, I do not know that the Court are called upon to avoid any hardship when they are to put a construction upon an act of Parliament; but the hardship is merely ideal. If this testator meant to give him this money, he might have done as others have done; he might have abandoned the bond in his life-time, and put an end to all

this question; but it is not to be considered as a very great hardship that is imposed upon this party, which subjects him to the duty of $2\frac{1}{4}$ per cent., instead of the payment of the principal of the full debt. That is the advantage he derives; though I am not prepared to say, that an action might not have been maintained by *James Holbrook* against the other party, stating, however, distinctly, that it is not necessary for the Court to decide that. The question is not as to the debt due from the executor of that person, but of the surety in the bond, who pays a sum of money, the necessity for the payment of which is imposed by the suretyship in that bond. I have always understood that the very consequence resulting from that situation, is a damnification for which he may recover over; but the only question here is, whether it is not liable to the legacy duty; and as this must be a legacy to the brother, the duty must be payable by him in the character of a brother. Then, with respect to the interest, the argument is founded upon a misapprehension of the state of things here; because, although interest, which very often does compose the residue of the estate, and is therefore assets, is liable to the payment of the duty, that is interest paid in consequence of the outstanding debts due to the testator: for instance, supposing this person, the legatee of the bond, had been liable to pay the whole, he would also pay the interest upon it, and that would have composed a part of the assets of the testator's property, part of the residue, and would be liable to the payment of a proportion of the duty as to the residue: but here, the moment the testator died (if this be a good bequest), the debt became *eo instanti* at an end—there is an end of the debt, and there is about half a year's interest paid up to the 1st *January* prior to the death of the testator, the testator dying in the *August* following; therefore, the amount upon which the legacy duty is to be paid, would be the amount of the bond, and such as would

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constitute a debt at the time of the testator's death; and I am of opinion that the duty to be paid ought to be according to the duty imposed upon a brother.

IN THE EXCHEQUER CHAMBER.

CORAM LORD TENTERDEN, C. J., AND BEST, C. J.

(*In Error from the Court of Exchequer*).

THE KING v. WINSTANLEY.

Quere, whether a sale by auction by the assignees of the absolute interest, in fee of an estate of the bankrupt in mortgage, is or is not liable to the auction duty.

1698. 1831.

THIS was a *scire facias* upon an auctioneer's bond, conditioned to render an exact account of the money bid at each sale by auction, and of the lots sold, and to pay the auction-duty in respect thereof, according to the true intent and meaning of the acts of Parliament in that behalf. The question raised by the pleadings was, whether a sale by auction by assignees of a bankrupt of the absolute interest in fee, of an estate belonging to the bankrupt in mortgage, is or is not subject to auction-duty. On a former argument, the Court of *Exchequer* had decided that a sale so circumstanced was not liable to the duty (*a*), upon which a writ of error was brought, and the case was now argued by—

The *Solicitor-General* for the Crown, who, in addition to the arguments urged upon the former occasion, contended that the question depended, not upon the construction of the late bankrupt act, 6 *Geo.* 4, c. 16, s. 98, but upon that of the statute 19 *Geo.* 3, c. 56, s. 15, the former

(*a*) 2 Y & J. 124.

act containing no repealing words, but being in effect the same as the latter, with the omission only of the order of the assigness, which omission was immaterial, as no sale could take place except by their order. He insisted that the latter act of Parliament, although its primary object was for the benefit of creditors, applied to sales *in invitum* merely; the first branch applying to a sale under an execution, and the second to a sale by order of assignees, in neither of which the proprietor of the estate had any participation; and, therefore, that the exception was inapplicable to a sale of the interest of the mortgagee, which could only be with his concurrence. He further submitted that the inapplicability of the exception to the present case was manifested by the sixteenth section, which, in the case of sales of bankrupts' property, required certain things to be done by the assignees, which could not be where the interest of third parties was disposed of. And he relied upon the authorities of *Coare v. Creed*(a), and *Rex v. Abbott*(b), as decisive of the question.

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Patterson, contra, recapitulated the argument upon which he relied in the Court below.

The learned Chief Justices differed in opinion; and, in consequence, upon the advice of Lord *Tenterden*, the Lord Chancellor affirmed the judgment of the Court of *Exchequer*, in order that the question might ultimately be disposed of by the highest tribunal of the country.

Judgment affirmed(c).

(a) 2 Esp. 699.

(b) 3 Price, 178.

(c) A writ of error is now pending in the House of Lords.

Upon the cases of *Coare v. Creed*, and *Rex v. Abbott*, the following

observations are made by a very learned author: "By an order of Lord *Rosslyn*, Bro. C. C. (at the end) it is directed, that, upon application by a mortgagee of a bankrupt's estate, the mortgaged estate

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shall be sold before the commissioners, or by public auction, if they shall think fit. And it has been decided (*Coare v. Creed*, 2 Esp. 699), that a sale of a mortgaged estate by auction under this order, is liable to the auction-duty, and is not within the exception, in the acts, of sales of bankrupts' estates *by order of the assignees*. The decision was made at *Nisi Prius*, and perhaps cannot be supported. The legislature intended that the creditors of bankrupts should have the advantage of selling the estates by auction without being charged with auction-duty. Now, this intention is, in the case under consideration, clearly subverted by the decision in *Coare v. Creed*. The argument was, that the sale was by the mortgagee, and so not part of the bankrupt's estate. But, if the money produced by the sale of the pledge is insufficient to cover the mortgagee's debt, he, of course, resorts to the general effect for a dividend on the residue. If the pledge produce more, the surplus sinks into the general fund; so that, assuming, as the legislature clearly did, that the auction-duty is in substance a charge on the land, it in this case takes so much from the bankrupt's property, distributable for the benefit of his creditors. It was considered to be clear, however, that, where the estate was sold by order of the assignees, with the consent of the mortgagee, no duty would be payable. But it has been decided, that a sale by assignees of an estate in fee, which was in mort-

gage for a term of years, was liable to the auction-duty, because the assignees sold the whole estate, and they had only the equity of redemption (*Rex v. Abbott*, 3 Price, 178). But the act of Parliament draws no such distinction. Most bankrupts' estates are in mortgage; and the exception would indeed be illusory if it only extended to estates upon which there was no incumbrance. The simple question, however, is, whether such a sale is not a *bonâ fide* sale by the assignees? It seems, indeed, to have been considered that the mortgagee had the property, and the bankrupt had only the equity of redemption. But even at law, the bankrupt had the fee simple in reversion expectant upon the term of years in the mortgage, and in equity, he was owner of the fee, in possession, subject to the debt. The case of *The King v. Abbott* went far beyond the case of *Coare v. Creed*. To avoid the effect of these decisions, assignees must in future sell the estate subject to the mortgage. The purchaser must, of course, pay off the mortgage out of the purchase money; and therefore, by the insertion of a few words in the particulars, the creditors may obtain the relief which the legislature intended to grant them. The words of the late act (6 Geo. 4, c. 16, s. 98) are, that "all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction-duty," which may probably remove all difficulty upon this subject." Sugden's Law of Vend. & Purch, pp. 14, 15.

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(In Error from the Court of King's Bench.)

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THE first count of the declaration stated that, whereas, on the 14th day of *December*, in the year 1823, at *Chepstow*, in the county of *Monmouth*, by a certain agreement, then and there made, between the said plaintiff in error, of the one part, and the said defendant in error of the other part, the date whereof was the day and year aforesaid, the said plaintiff in error, for himself, his heirs, executors, and administrators, in consideration of the sum of 1,300*l.*, to be paid to him or them on the 2nd day of *February* then next ensuing the date thereof, by the said defendant in error, did thereby agree with the said defendant in error, his heirs and assigns, to sell and convey to him the said defendant in error, his heirs and assigns, for ever, on the said 2nd day of *February* then next, a certain freehold messuage, or dwelling-house, and certain customary messuages, lands, &c., in the said agreement particularly mentioned and described, and the said defendant in error, for himself, his heirs, executors, and administrators, did thereby agree with the said plaintiff in error, his heirs, executors, and administrators, to purchase the said freehold and customary messuages, lands, and hereditaments, thereinbefore mentioned and described, and to pay the said plaintiff in error, his executors and administrators, for the same, the sum of 1,300*l.*, on the said 2nd day of *February* then next, on having the same conveyed and surrendered to him the said defendant in error, his heirs, and assigns, by the said plaintiff in error, or his heirs; and further, that the said defendant in error should bear all the expense, costs, and charges, of the conveyance and surrender to him of the said freehold and customary hereditaments and premises, and of any fines, recoveries, or other assurances, necessary to convey and

By articles of agreement between the vendor and purchaser of an estate, it was agreed that the purchaser, bearing the expense of certain suits commenced by the vendor against an occupier for bygone rent, should have the rent so to be recovered, and also any sum that could be recovered for dilapidations, and that the purchaser, at his expense, might use the name of the vendor in any action he might think fit to commence against the occupier, for arrears of rent, or dilapidations:—*Held*, that the agreement was not void, as amounting to champerty.

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surrender the same respectively; and, further, that the said plaintiff in error, his heirs, executors, and administrators, should receive the rents, and pay all out-goings in respect of the said freehold hereditaments, up to the said 2nd day of *February* then next; and after reciting that proceedings, both at law and in equity, were then pending, between the said plaintiff in error and Sir *Henry Protheroe*, in which proceedings at law the said plaintiff in error was plaintiff, and sought to recover from the said Sir *H. P.* six years' rent, at 80*l. per annum*, due the 2nd day of *February* then last, for and in respect of the said customary hereditaments and premises, under and by virtue of a certain agreement made between the said plaintiff in error, and the said Sir *H. P.*, it was, by the said agreement, further agreed and declared, by and between the said parties thereto, that the said defendant in error, his heirs, executors, and administrators, should have and receive the said arrears of rent so claimed to be due from the said Sir *H. P.*, for his and their own use and benefit, and also the said rent due from the said Sir *H. P.*, or to become due for the current year ending on the 2nd day of *February* then next, and also that the said defendant in error, his heirs, executors, and administrators, should have, and be entitled to, all sums of money that could be recovered from the said Sir *H. P.*, for and in respect of dilapidations and wants of repair of and in the said customary hereditaments and premises; and, further, that the said defendant in error, his heirs, executors, and administrators, should be at full liberty to use the name or names of the said plaintiff in error, his heirs, executors, and administrators, in the proceedings at law and in equity, then pending between the said plaintiff in error and the said Sir *H. P.*, and also in any other action or actions, suit or suits, which he the said defendant in error, his heirs, executors, and administrators, should think proper to commence and prosecute against the said Sir *H. P.*, for

the recovery of the said arrears of rent, or of the current year's rent, or for dilapidations, or wants of repair, of and in the said customary hereditaments and premises; and further, that the said defendant in error should bear, pay, and discharge, the costs of the said plaintiff in error, in the proceedings then pending, and indemnify him the said plaintiff in error, his heirs, executors, and administrators, of, from, and against all costs and charges of any future proceedings that might be had by the said defendant in error, in the name of the said plaintiff in error, his heirs, executors, and administrators against the said Sir *H. P.* as by the said agreement, reference being thereunto had, fully appears; and the said agreement being made as aforesaid, afterwards, to wit, on &c., at &c., it was, at the special instance and request of the said plaintiff in error, agreed by and between the said parties, that the price or money to be paid by the said defendant in error to the said plaintiff in error, for the said freehold estate and tenement, in the said articles of agreement first mentioned, should be a certain sum of money, to wit, the sum of 500*l.*, part of the said sum of 1,300*l.*, and that the price or sum to be paid by the said defendant in error to the said plaintiff in error, for the said customary tenements and premises in the said agreement also mentioned, should be the residue of the said sum of 1,300*l.*, to wit, the sum of 800*l.*, subject to the terms in the said agreement specified; the declaration then contained mutual promises, and averred that although the said plaintiff in error, in part performance of the said agreement, and of his said promise and undertaking, did afterwards, to wit, on &c., at &c., sell and convey the said freehold tenements and premises in the said agreement first mentioned to the said defendant in error, and his heirs and assigns, at and for the said sum of 500*l.*, and the said defendant in error then and there paid the said sum of 500*l.* to the said plaintiff in error, upon the terms aforesaid, and although

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the said defendant in error was afterwards, to wit, on &c., and from thence hitherto, ready and willing to accept, receive, and take of and from the said plaintiff in error, a surrender to him the said defendant in error, of the said customary tenements and premises in the said agreement mentioned, at and for the said sum of 800*l.*, upon the terms aforesaid, and to bear all the expenses, costs, and charges of such surrender, and all necessary assurances in that behalf, and to pay the said sum of 800*l.*, and complete the said purchase on his part and behalf in all respects upon the terms aforesaid, to wit, at &c., and although the said defendant in error afterwards, to wit, on &c., and oftentimes afterwards, offered to the said plaintiff in error, to complete the said purchase of the said customary tenements and premises, with the appurtenances, upon the terms aforesaid, and requested the said plaintiff in error to sell and surrender to him the said defendant in error, the said customary tenements and premises upon the terms aforesaid, to wit, at &c., yet the said plaintiff in error not regarding the said agreement nor his said promise and undertaking, but contriving &c., did not, nor would, on the said 2nd day of *February*, in the year last aforesaid, or at any other time, surrender or convey to the said defendant in error the said customary tenements and premises in the said agreement in that behalf mentioned, or any part thereof, upon the terms aforesaid, but the said plaintiff in error wrongfully neglected and refused ever to surrender the said customary tenements and premises to the said defendant in error, according to the said agreement, and wrongfully discharged the said defendant in error from any further performance by him of the said agreement on his part, contrary to the agreement and the said promise and undertaking of the said plaintiff in error, to wit, at &c., to the special damage (stating it) of the said defendant in error.

The declaration contained several other counts, upon

the whole of which a general verdict was taken, and final judgment was entered up, by the defendant in error, the plaintiff below.

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A writ of error was afterwards brought, and the case was now argued, by

Curwood, for the plaintiff in error.

The verdict being general, and the damages entire, the judgment of the Court below cannot be sustained, if either of the counts of this declaration is bad. *Holt v. Scholefield*(a). Now, the first count discloses an illegal agreement and a clear case of champerty. By the agreement stated in that count, the vendee not only acquires a right to prosecute existing actions, but also to institute a suit for dilapidations, in the name of the vendor. If the ancient law of champerty were not now relaxed, there could be no question as to the illegality of such an agreement; but although that law has been relaxed in modern times, yet there is no case in which a party has been allowed to purchase even a right to continue an action, much less to institute an original suit. According to the ancient rule of law, no chose in action is assignable. That rule has, however, been relaxed, in favour of bonds; for if *A.* be bound to *B.* in 20*l.*, *B.* may give and deliver this obligation to a stranger, and the stranger may justify the detaining of the obligation by this gift against the obligee; for though the debt cannot be granted over, yet the parchment may. 2 *Roll. Abr.* Graunts, (G) pl. 25. And so may the wax to another, who may cancel and use the same at his pleasure. *Co. Litt.* 232 b. Such an assignment confers upon the donee a remedy in equity upon the obligation, and at law he may sue in the name of the obligee, but not in his own name; for, even in this case, the Courts retain the shadow, although the substance of the rule is dispensed with. A like exception is founded upon the

(a) 6 T. R. 691.

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mercantile law, by which commercial instruments are assignable. But with these exceptions, and such as are founded upon statutes, the old maxim of law remains, that no right of action can be transferred. Some of the older cases upon the subject of maintenance are absurd and inapplicable to the now existing state of society, as, for instance, it is said, that a man may advise what counsel shall be consulted, and may go with the party to consult him, but if he speak to him, or give advice, he shall be guilty of maintenance. Such a proposition could not now be contended for, but the Court must apply the ancient principles of the law to the exigency of modern times, and this ancient principle is, that no man shall purchase litigation. The statute of *West. 1, (3 Ed. 1), c. 25*, against champerty, enacts, that no officer of the king by himself, nor by other, shall maintain pleas, suits, or matters depending in the King's Courts, for land, tenements, or other things, for to have part thereof, or other profit, by covenant made; and he that so doth shall be punished at the king's pleasure. According to the commentary of Lord *Coke (a)*, (by the words "depending in the King's Courts") it is declared, that regularly champerty is *pendente placito*, and that within the words of the statute, "or other things," are included leases for years, and other goods and chattels, debts and duties. Now this agreement is, that the vendee shall have the bye-gone rents, which, but for the agreement, would not have passed to the vendee, but would have continued the property of the vendor. This stipulation, therefore, amounts to champerty and is illegal, and being incorporated in the agreement will vitiate the whole (*b*).

Campbell, contra, was stopped by the Court.

(a) 2 Inst. 208.

(b) See 1 Wms. Saund. 66, n(1).
In the case of *Chesman v. Nainby*,
2 Lord Raym. 1459, it was holden

that if a bond is given with a condition to do a thing against an act of Parliament, and also to pay a just debt, the whole bond will be void.

BEST, L.C.J.—The question is, whether this agreement is void for champerty. Champerty is, according to the definition of Lord Coke, a bargain with the demandant or tenant, plaintiff or defendant, to have part of the thing in suit, if he prevail therein, for maintenance of this or that suit. In the same commentary, Lord Coke takes a distinction between officers of the King and strangers. The purchase of a matter in suit, *pendente placito*, by a person in office, is champerty, but it is not champerty if the purchase be by a stranger. But here it is by a *bond fide* purchaser to recover rent due, and in respect of injuries committed previously to the purchase. That applies to the agreement respecting the bye-gone rents, to which it is said, without the agreement, the vendor would be entitled. To say that the agreement respecting the dilapidations is champerty, would be carrying the law of maintenance and champerty further than it was ever carried, in times when that law was necessary for the then state of society. In my opinion, the agreement is legal, and the judgment of the Court below should be

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Affirmed (a).

(a) The statute 28 Ed. 3, c. 11, which was not alluded to in the argument, is as follows: "And further, because the King hath heretofore ordained, by statute, that none of his officers shall take any plea or champerty, and by that statute other than officers were not bounden before this time, the King willeth that no officer, *nor any other*, for to have part of the thing in plea, shall take upon him any businesses that are in suit, nor none upon any such covenant shall give up his right to another; and if any so do, and he be attainted thereof, the taker shall forfeit unto the King so much of his lands or goods as doth amount to the value of the part that he hath

purchased by such undertaking; and for such attainder, whosoever will, shall be received to sue for the King before the justices before whom the plea shall have been, and the judgment shall be given by them. But it is not to be understood hereby, that one may not have counsel of pleaders, or of learned men (for his fee), or of his relations or neighbours." See 2 Inst. 207. Evans' Statutes, pt. 3, class 10. Bentham's Defence of Usury; Chitty on Bills, 7th ed. 6, 7; and the observations of Mr. Justice Buller in *Master v. Miller*, 4 T. R. 320; and of Mansfield, C. J. in *Goodright v. Forrester*, 1 Taunt. 578.

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EXCHEQUER CHAMBER IN EQUITY.

1827,
July 1st.
1829,
Jan. 26th.

THOMAS ASTON, and PHILIP HURD,—Plaintiffs;
CHARLES GWINNELL, and JOHN ASKEW,—Defendants.

A., by two several deeds, granted to *B.* two annuities, charged on certain estates, of which *A.* was tenant for life, and further secured by a warrant of attorney, and an insurance on the life of *A.*, and memorials of these annuities were duly inrolled. Afterwards, by deed, *A.* granted another annuity to *B.*, charged upon the same estates, and also upon another

BY an indenture, dated 11th *January*, 1823, the defendant, *John Askew*, granted to the plaintiff, *Philip Hurd*, his executors, administrators, and assigns, an annuity or yearly sum of 560*l.*, for and during the life of the defendant *John Askew*, charged upon and made payable out of certain messuages, farms, lands, and hereditaments, at *Middleton*, in the county of *Westmorland*, and at *Stons Lorkaw*, and *Trinkerly*, in the county of *Lancaster*, in which the defendant *John Askew* had, or was presumed to have, an estate for life. And by the same indenture, the defendant *John Askew* demised the same messuages, farms, lands, and hereditaments, to a trustee for the plaintiff *Philip Hurd*, for a term of ninety-nine

estate to which *A.* was likewise entitled, and by a further insurance on *A.*'s life. By this deed, *A.* also charged the two former annuities upon the last-mentioned estate. And he conveyed his interest in all the estates to a trustee, in trust, for securing the three annuities. The three annuities were further secured by a covenant in this deed, on the part of the grantor, to authorize and permit his deputy, in an office held by him, to pay a yearly sum to the trustee towards the annuities; and by a covenant for payment of extra premiums of insurance. A memorial of the grant of the last-mentioned annuity was inrolled, but no further or additional memorial was inrolled as to the two first-mentioned annuities with regard to the charge of them on the additional estate, and the additional securities for them contained in the last-mentioned deed: nor in the memorial, inrolled of the third annuity, was any notice taken of the additional securities for the two first annuities.—*Held*, that it was not necessary, under the annuity-act, to inrol any memorial of the further or collateral securities for the two first annuities.

Where, on the grant of an annuity, the consideration money was, with the assent of the grantor, paid to a trustee to be applied by him in payment of the costs of the annuity deeds, afterwards of certain debts due from the grantor to judgment creditors, and the surplus to the grantor. *Held*, that this was not a retainer within the meaning of the statute, so as to render the annuity void, notwithstanding the trustee was the partner of the grantee, and both of them were the solicitors employed in the transaction.

The office of clerk to the deputy registrar in the Prerogative Court of *Canterbury* is not an office connected with the administration of justice, within the meaning of the statute 5 & 6 *Edw.* 6, c. 16, so as to prevent its being aliened or charged. Nor is an alienation of or charge on the profits of the office, contrary to the policy of the law, restricting the alienation of the income of a public officer.

years, if the defendant *John Askew* should so long live, upon certain trusts for securing the annuity.

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By another indenture, dated 30th *July*, 1823, the defendant *John Askew* granted to the plaintiff *Philip Hurd*, his executors, administrators, and assigns, an annuity or yearly sum of 120*l.* during the life of the defendant *John Askew*, charged on and payable out of the same premises as the annuity of 560*l.*

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2 *Go? Coll Ex* - 322

15 *Decr* - 599

3 *Dec. 4m 64* 880

10 *Nov* . 414

By an indenture, dated 23rd *June*, 1826, made between the defendant *John Askew* of the first part; the plaintiff *Philip Hurd* of the second part; and the plaintiff *Thomas Aston*, of the third part; after reciting (*inter alia*) the two several grants of annuity above mentioned, and also reciting the title of the defendant *Askew*, in remainder, to some other estates, and reciting certain charges on the estates charged with the two annuities to the plaintiff *Philip Hurd*, especially a rent-charge of 200*l.* a-year to the widow of a former tenant for life of the estates, of the existence of which incumbrances, the plaintiff *Philip Hurd* was not aware when the annuities were granted to him; and also reciting various incumbrances upon or affecting the premises, not material in this place to be noticed. And likewise reciting that the defendant *John Askew* then had and enjoyed a certain office, place, situation, or employment in the Prerogative Court of the Archbishop of *Canterbury*, and was in the receipt of certain monies, gains, profits, and perquisites belonging to such office, place, situation, or employment. And further reciting a contract by the defendant *John Askew*, for the sale to the plaintiff *Philip Hurd*, of a further annuity or yearly sum of 194*l.*, during the life of *Askew*, for the sum of 1,100*l.* And that, upon the treaty for the sale of the said annuity, it was agreed that the costs and expenses of preparing and perfecting the securities for the same, and of inrolling a memorial thereof, should be paid out of the said principal sum of 1,100*l.* And that the said sum of 1,100*l.* should

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be paid to *George Johnson* therein described, in trust thereout, in the first place, to pay the costs and expenses of preparing and perfecting the securities for the annuity of 194*l.*, and of inrolling a memorial thereof; and in the next place to pay certain sums therein mentioned, to certain persons therein named; and in the next place to pay to the several creditors of the defendant *John Askew*, who should execute a composition deed of even date, a composition of 10*s.* in the pound on their debts. And in trust to pay the residue, if any, to the defendant *John Askew*. And also reciting that the plaintiff *Philip Hurd* had, on the day of the date thereof, paid the said sum of 1,100*l.* to the said *George Johnson*. And further reciting that, upon the treaty for the sale of the annuity of 194*l.*, it was agreed that a debtor and creditor account should be made out, adjusted, and settled, between *Askew* and *Hurd*, and that the balance which on the statement of such account should appear to be due and owing from the defendant *John Askew*, to the plaintiff *Philip Hurd*, should be secured by an insurance to be effected by the plaintiff *Philip Hurd* on the life and at the costs of the defendant *John Askew*.—The deed then recited the statement of an account between the defendant *Askew*, and the plaintiff *Hurd*, by which a balance of 1,313*l.* 11*s.* 11*d.* appeared to be due to the plaintiff *Hurd*. And further recited, that an insurance for 1,200*l.* on the life of the defendant *Askew* had been effected by the plaintiff *Hurd*;—And likewise recited, that the defendant *Askew* had, by a writing under his hand, of even date therewith, directed, authorized, and empowered the defendant *Gwinnell*, being the person then performing the duties of the office held by the defendant *Askew* in the Prerogative Court, as the deputy of the defendant *Askew*, or other his deputy for the time being in such office, by, with, and out of the monies, gains, and perquisites, which should be had or derived from, or in respect or on account of, such office, to pay to the plaintiff *Aston*,

his executors, administrators and assigns, the annual sum of 420*l.* by equal monthly payments.—By this deed, after these recitals, the defendant *Askew* granted to the plaintiff *Philip Hurd*, his executors, administrators and assigns, an annuity or yearly sum of 194*l.* for the life of the defendant *Askew*, charged and chargeable on, and payable out of, the estates charged with the annuities of 560*l.* and 120*l.*, and also on certain other estates at *Ellington*, in the county of *Northumberland*, to which the defendant *Askew* was entitled to an estate in remainder, expectant on certain events therein mentioned.—The defendant *Askew*, then by the same deed charged the estates at *Ellington* with the payment of the annuities of 560*l.* and 120*l.*; and covenanted for the payment of the 1,313*l.* 11*s.* 11*d.*, due on balance of account to the plaintiff *Hurd*, and the premiums of insurance on certain policies on *Askew's* life, and with the payment of which *Askew* also charged the estates. And the defendant *Askew* granted and conveyed to the plaintiff *Aston*, all the estates for the life of the defendant *Askew*, upon the trusts therein mentioned. And it was agreed and declared, that the plaintiff *Aston*, his heirs, executors, administrators and assigns, should stand seised and possessed of the said hereditaments and premises, and also of the said annual sum of 420*l.* so directed to be paid to the plaintiff *Aston* as aforesaid, upon trust, by and out of the rents and profits of the said estates, and the said annual sum of 420*l.*, after retaining the expenses therein mentioned, to pay the several sums of money therein mentioned and specified, including the three annuities to the plaintiff *Hurd*, and also all sums paid by *Hurd* for extra premiums on the policies of insurance therein mentioned. And in the next place to pay the plaintiff *Hurd* the interest of the said sum of 1,313*l.* 11*s.* 11*d.* And also all such costs as *Hurd* should sustain by reason of any claims or demands against the

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premises, or other the claims therein mentioned, with interest; and in case there should be any surplus, to pay over the same to *Hurd*, in reduction of the said debt of 1,313*l.* 11*s.* 11*d.*, until the whole should be paid, and afterwards to pay such surplus to the defendant *Askew*. —The deed also contained a proviso, that if at any time thereafter the rents and profits of the estates, and the said sum of 420*l.* should be insufficient to answer the several payments directed to be made, and the defendant *Askew* should not, on request, make good the deficiency, it should be lawful for the plaintiff *Aston*, at the request of the plaintiff *Hurd*, to sell the said hereditaments and premises, subject and charged as therein mentioned, and to stand possessed of the monies arising from such sale, in trust to invest the same in Government securities; and to pay and apply the dividends of such securities, and, if necessary, any part of the principal, upon the same trusts as were declared of the rents and profits, and the 420*l.* And the defendant *Askew* thereby covenanted in certain events therein mentioned, to charge certain other estates with the said several annuities and sums of money; and also, that if at any time thereafter any claims or demands should be made on or against the premises, or against the plaintiffs for or in respect of any judgment theretofore recovered against the defendant *Askew*, then and in such case the defendant *Askew* would, at the request of the plaintiff *Hurd*, authorize and empower *Askew's* deputy for the time being, in the said office, or other the person or persons whom it should or might concern, by, with, and out of the monies, profits, gains, and perquisites which should be derived from such office, to pay to the plaintiff *Aston*, his executors, administrators and assigns, the further annual sum of 200*l.*, by monthly payments.

In *January*, 1827, the plaintiffs filed their bill stating the indentures above set forth; and further stating that, short-

ly after the execution of the indenture of the 23rd *June*, 1826, and shortly after the first monthly payment in respect of the said annual sum of 420*l.* became payable, the plaintiffs applied to the defendant *Gwinnell* for payment thereof, but *Gwinnell*, by the order and direction of *Askew*, not only refused to pay the same, but declared he would not make any payment, in respect of the said annual sum of 420*l.*, at any future time. The bill also alleged that *Askew* had given notice to the tenants not to pay their rents.—Among other charges contained in the bill, was a charge that *Askew* duly signed and sent to the defendant *Gwinnell* an order in writing, in the words and figures following, *vis.*—

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“ To Mr. *C. Gwinnell*.

“ Dear Sir,—I hereby request, direct, authorize, and
“ empower you, as my deputy, in the performance of my
“ duties and department in the Prerogative Court of the
“ Archbishop of *Canterbury*, or any succeeding deputy of
“ mine in such office, or other the person or persons whom
“ it does, shall; or may concern, from time to time, by,
“ with, and out of, the monies, gains, profits, and perqui-
“ sites, which shall be had or received from or in respect
“ of such office, to pay to *Thomas Aston*, the younger, of
“ No. 43, *Upper Guildford-street*, in the county of *Middle-*
“ *sex*, merchant, his executors, administrators, and assigns,
“ or as he or they shall direct, the principal sum of 420*l.*,
“ by equal monthly payments; the first of such payments
“ to be made on the 23rd *July* next. Dated the 23rd day
“ of *June*, 1826.

“ *John Askew.*”

The bill further charged, that the order was delivered to the defendant *Gwinnell*, at or about the time of the date thereof, and that, on the receipt thereof, he made no objection thereto, but engaged to pay the said annual sum

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of 420*l.* to the plaintiff *Aston*. And, after suggesting a pretence by the defendants, that the fees, gains, and perquisites, out of which the said annual sum of 420*l.* was directed to be paid, were received in respect of some office connected with the administration of justice, and could not be legally assigned, the bill charged, that, although some small part of such fees, gains, and perquisites, might be in some manner connected with the administration of justice, yet, that the greater part of the profits of such office, and to the amount of many hundred pounds a-year, arose from discount allowed at the stamp-office upon the issuing of different stamps. The bill prayed the payment of the arrears then due of the 420*l.* a-year, and that the trusts of the indenture of the 23rd *June*, 1826, might be performed and carried into execution. The bill also prayed a sale of the estates and property made saleable by the last-mentioned deed, and, in the mean time, a receiver; and also an injunction to restrain the defendant *Gwinnell*, or other the deputy of *Askew*, from paying over the fees of the office to the defendant *Askew*.

The defendants put in separate answers.

By those answers they stated the defendant *Gwinnell* to be the deputy of the defendant *Askew*, and of a Mr. *William Abbott*, in the place or office of one of the clerks assistants to the Deputy Registrar of the Prerogative Court of *Canterbury*, which place or office was holden by *Askew* and *Abbott* during the pleasure of the principal registrars. That the fees, gains, and perquisites of the said office, arose from fees and monies payable for or in respect of the several instruments directed to be issued by and out of the Prerogative Court, particularly probates, letters of administration and commissions, and also of or from a portion of the discount upon the amount of stamps upon or in respect of such instruments, allowed by the commissioners of stamps. That the defendant, *John Askew*, one year with another, received, as his portion of

such allowance for discount, the sum of 620*l.* The defendant *Gwinnell* alleged that he had paid certain monies on account of the defendant *Askew*, and which he claimed to retain out of the fees in his hands. Both the defendants submitted that the office was an office connected with and touching or concerning the administration and execution of justice; and, therefore, that the fees, perquisites, gains, and profits thereof, or arising therefrom, could not be legally assigned or charged with the payment of money. The defendants further submitted, that, if the said fees and perquisites could be legally assigned, then that the order of the 23rd *June*, 1826, was an instrument or assurance whereby an annuity was granted, or an annuity or annuities was or were secured, and that a memorial thereof ought to have been inrolled, pursuant to the statute.

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The defendant *Askew*, by his answer, also stated that *George Johnson*, to whom the 1,100*l.*, the consideration for the annuity of 194*l.* was paid, was the partner of the plaintiff, *Philip Hurd*, in the profession of an attorney and solicitor. And that, with the exception of 100*l.*, the defendant *Askew* never received any part of the 1,100*l.*, though, by an account delivered of the manner in which the 1,100*l.* had been applied, it appeared that a balance of 161*l.* 4*s.* 6*d.* was in the hands of *Johnson*; and that one of the items contained in the said account as paid by the said *George Johnson*, in execution of the trusts of the indenture, and as part of the 1,100*l.*, was the sum of 92*l.* 18*s.* 2*d.*, the bill of costs of the plaintiff, *Philip Hurd*, and the said *George Johnson*, as solicitors, for preparing the said indenture and other securities for the said annuity of 194*l.* The defendant *Askew* also submitted that he was, by the said indenture of the 23rd *June*, 1826, to pay to the plaintiff, *Philip Hurd*, in consideration of the 1,100*l.*, an annuity of 194*l.*, and such further annual sum or sums of money, as the plaintiff, *Philip Hurd*, should become liable to pay, for extra premiums of insurance on the defendant's life, and that such

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annual sums for extra premiums were not only secured by covenant, but were actually and really secured out of the rents and profits of the said estates. The defendant also contended, that the charge of the annuities of 560*l.* and 120*l.* on the said estates at *Ellington*, was a new grant and charge, and was effected only by the said indenture of the 23rd *June*, 1826.—That, in the memorial of the said last-mentioned indenture, bearing date the 23rd *June*, 1826, the amount of the annuity granted by the said indenture was stated to be 194*l.* and no more, and no mention was made of the other annuities, or of the sums of money for extra premiums. And that no memorial of the said annuities of 560*l.* and 120*l.*, or the said extra premiums of insurance, or any of them, in which the indenture of the 23rd *June*, 1826, was inserted or mentioned as the deed or instrument by which the same was or were granted, had ever been inrolled according to the provisions of the act of Parliament. And the defendant submitted, that, as no such memorial had been inrolled, the deed was, under the provision of the act, null and void; and that the deeds and securities ought to be delivered up on payment of the money actually advanced, which the defendants accordingly offered to pay.

Mr. *H. Martin*, and Mr. *Girdlestone*, for the plaintiffs.—The letter or order to *Gwinnell*, was not a security for the annuity within the provisions of the act; and if it had been still, the omission to inrol a memorial of it would only render that instrument void, and would not affect the other securities. It is not necessary to inrol any further or collateral securities, when the original security for the annuity is properly inrolled. *Ex parte Price (a)*.—With respect to the office, it is purely ministerial: the holder of it cannot, by any possibility, adjudicate on any instrument, or on any legal question.

(a) 3 Madd. 132.

The statute *Edw. 6*, contains no exception as to offices under the Archbishop of *Canterbury*. It was not necessary to inrol any memorial of the further securities for the two first annuities. *Morris v. Jones* (a).

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Mr. *Fonblanque*, Mr. *Treslove*, and Mr. *Haldane*, for the defendants.—Even if the office in this case were not an office connected with the administration of justice, still it is contrary to the policy of the law to permit a public officer to charge the salary attached to that office with his debts. The income of this office is no more assignable than the half-pay of military and naval officers. *Stone v. Lidderdale* (b). If it were unnecessary to memorialize this order as a grant, it follows it can be no security for the annuity. There are many modern cases in which an annuity has been set aside, where part of the consideration has been retained by the agent of the grantee for a debt due to the agent from the grantor, even though the grantee never received any part of the money retained, and was ignorant of the transaction. *Williamson v. Goold* (c), *Gorton v. Champneys* (d). In the present case the whole of the consideration for the annuity was retained by *Hurd*, or by *Johnson*, as his agent. The transaction is also vitiated under the statute by the retainer by *Hurd* of the costs of the securities. *Calton v. Porter* (e), *Jones v. Silberschildt* (f). The covenant to pay the extra premiums not being noticed in the memorial, also renders the annuity void. *Cummins v. Isaac* (g), *Taylor v. Johnson* (h), *Chawner v. Whaley* (i).—*Trevor's case* (k) was also cited for the defendants.

Mr. *Martin* replied.

The Court took time to consider.

(a) 3 Dowl. & Ryl. 263; 2 Barnw. & Cress. 232.

(b) 2 Anstr. 533.

(c) 8 J. B. Moore, 109, 324; 1 Bingh. 234.

(d) 8 J. B. Moore, 302; 1 Bingh. 287.

(e) 9 J. B. Moore, 703; 2 Bingh. 370.

(f) 4 Bingh. 26.

(g) 8 T. R. 183.

(h) 8 T. R. 184.

(i) 3 East. 500.

(k) Cro. Jac. 279.

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THE LORD CHIEF BARON (*after stating the deeds and the pleadings*).—The objections that have been stated to the relief demanded in this case, are three:—*First*, That there was no proper memorial of the deed of *June*, 1826, on which the whole relief prayed is founded. *Secondly*, That part of the consideration was returned or retained, and therefore that the deed is void under the present annuity act, the 53 *Geo.* 3. *Thirdly*, That no decree can be made respecting the profits of the office, for several reasons: as it touches the administration of justice, and therefore all contracts respecting it are void: as the profits are intended for the support of a public officer, and therefore cannot be aliened: and that *Gwinnell* is not in a situation which would justify the Court in making a decree against him.

The memorial is exactly in the form required by the act. It is precisely on the model of it. The objection made to the memorial is, that it does not mention the further charge which the deed contains to secure the two annuities previously granted by the two former deeds. The memorial required by the act of the 53rd of the late king appears to have had in view an object entirely different from that which was the object of the act of the 17th of his late Majesty, known as Lord *Loughborough's* act. The act of 17 *Geo.* 3, required an explanation of the whole transaction to the minutest particular; and in truth rendered it hardly possible to sustain any transaction of this description. The last act, that of the 53 *Geo.* 3, seems to require only such a memorial as will enable you certainly to obtain a production of the deed.

To the objection stated on the present occasion, it is sufficient to answer, that the act does not require the memorial to state on what property even the annuity granted by the deed in question is charged. In the case of *Brown v. Lea* (a), it was decided, that “a grant of annuity” was a sufficient description, under the statute, of a deed by

(a) 6 Barn. & Cress. 690.

which an annuity was granted, though sureties covenanted for the payment of it, and it was further secured by an assignment of stock. It follows that there can be no occasion to insert in the memorial a charge to secure other annuities not granted by it.

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The next objection is, that part of the consideration was retained or returned to the grantor. The facts are, that it was part of the contract that the grantor should pay out of the consideration the expenses of the deeds: that the money should be paid to *Johnson* as a trustee, and that he should apply it first to the payment of these costs, then of other debts due from *Askew*, and, if there should be any surplus, should pay that surplus to *Askew*. The transaction was executed according to these stipulations. There seems to me no ground for calling this either a retainer or a return of part of the consideration money. In *Mouys v. Leake* (a), this seems to have been expressly decided by Lord *Kenyon*, and the Court of *King's Bench*. It was stipulated in that case that the grantor should pay for the deeds. Immediately after the payment of the consideration money, he paid the bill of fees to a clerk of the plaintiff, the grantee's attorney. And notwithstanding this objection the Court sustained the annuity. In *Hurd v. Girdlestone* (b), the grantee of the annuity was the attorney who prepared the securities, and retained his charges out of the consideration money, including a charge for business, which, by neglect, he had not done, and yet the Court of *Common Pleas* held that it was not a retainer within the act, so as to avoid the annuity. I can see no objection in principle to these cases. If it be lawful to stipulate for the payment by the grantor of these costs, it seems reasonable enough that the transaction should not be avoided by the execution of this stipulation in the manner mentioned in these cases. This is a more favour-

(a) 8 T. R. 411.

(b) 1 Marsh. 407; 6 Taunt. 8.

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able case. Here, the consideration was paid to a third party as a trustee for the grantor, and by him was applied in satisfaction of the bill. It is true this third person was the partner of the grantee and interested in the bill. But it is difficult to say that the transaction can be either a return or a retainer when it is a transaction with a third party, and the purpose is just and lawful, when it would not have been so with the grantee himself, or his attorney representing him.

It is then objected to the part of the prayer respecting the profits of the office, that the contract is void by the statute of 5 & 6 *Edw. 6*, c. 16. I am not able to perceive the bearing of this act upon the present question. The object of that law was, to prohibit corrupt contracts by which a right to an office or a right to exercise any of its duties might be obtained, with a view that persons worthy of such trusts might be advanced to them. This contract seems to me to have no relation to that subject. Forgetting, for the moment, that this is a mere clerkship held during the pleasure of the chief officer, I cannot avoid recollecting that the appointment or any influence used or to be used for the purpose of obtaining it, is quite remote from this transaction. I cannot, therefore, apply any argument drawn from that statute to the point now under my consideration.

Another class of cases has been, with more plausibility, applied to this controversy. I allude to that class which is founded on principles of state policy, and which protects the servants of the public from their own improvidence, and secures to them, in defiance of their own acts, the possession of those resources derived from the public, and intended to enable them to perform their public functions. The pay of naval and military officers, and their incapacity to assign it either at law or in equity, after some hesitation, at last established, affords the most distinct and intelligible instance of the application of

this rule. The office, or rather the profits of the office of clerk of the peace, seems another instance of the same character. But I am not able to apply that principle to the situation of the defendant *Askew*. His situation is called an office, but its nature is not very distinctly explained. This, however, is represented, that he is a mere clerk, assisting the deputy registrars, receiving emoluments for business done at the pleasure of his superiors. It does not appear to me, that he can be considered as an officer of the court. And, as to his connection with the actual execution of any function in the Prerogative Court, there is none. It is confined to receiving, during the pleasure of his superiors, certain sums earned by the labours of another person permitted actually to perform there these functions. I cannot sustain this objection to the relief prayed. It has occurred to me as a doubt, whether I ought not to leave the plaintiffs to their remedy by action as to this fund; or, in other words, whether the transaction amounts to an assignment in equity, of the fund in the possession of Mr. *Gwinnell*. This turns upon the order dated 23rd *June*, 1826, the same day with the deed. There is in the deed, so far as I can discover, one covenant only, really material to this part of the subject. It is the covenant in which Mr. *Askew* contracts, that the hereditaments and premises, and the annual sum of 420*l.*, shall remain and be unto and to the use of the said *Thomas Aston*, upon the trusts previously declared. I may also mention the covenant for further assurance, although it does not enumerate any particulars, but is expressed in general terms, *vis.* for effectuating the trusts and purposes, and the intents and meaning of the deed.

I do not find that the cases analogous to the present have been numerous. A revocable order upon a fund, and a covenant not to revoke that order, which this covenant in effect is, appears to throw upon the covenantee all the

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rights which the subject is capable of, and to authorize the Court in directing the account prayed, saving, however, to Mr. *Gwinnell*, all his claims, and holding him responsible for nothing beyond the clear balance, to the amount of 420*l. per annum*. It appears to me, that to this extent the plaintiffs are entitled. I will leave it open for Mr. *Gwinnell* to insist upon all the deductions to which the rules of law and equity entitle him.

I think, therefore, the plaintiffs entitled to a sale of the real estate, and to an account of the profits of the office, received by the defendant *Gwinnell*, for the benefit of the defendant *Askew*. I think *Gwinnell* will be entitled to be allowed every thing he paid to Mr. *Askew* before the service of the deed upon him, which was on the 2nd of *August*, 1826. I must also give costs against the defendant *Askew*; the defendant *Gwinnell* must have his costs paid to him by the plaintiffs, to be repaid by *Askew*, or out of the fund.

1828.
Nov. 11, 12, 18.

1829.
Jan. 28.

BOZON and Another v. WILLIAMS and Others.

The possession of a client's deeds by his solicitor, is so usual and so much in the ordinary course of transactions, that where a person purchases an estate, and is informed that the deeds are in the hands of the so-

THIS cause was heard on the 11th, 12th, and 18th days of *November*, 1828, and on the last-mentioned day was adjourned for judgment.

Mr. *Rose* and Mr. *Bethell* for the plaintiff.

Mr. *Treslove* and Mr. *Walker* for the defendants.

The facts which gave rise to this case, and the argu-

licitors of the owner of the estate, there is nothing in that circumstance which renders it necessary for him to inquire under what circumstances the solicitor holds the deeds. And, therefore, where a solicitor acquires by contract a different interest beyond what his character of solicitor confers (such as an equitable mortgage), it is incumbent on him immediately to give clear and distinct notice of such interest to all persons in the visible ownership of the estate. And such a case is not within the principle of the cases in which a purchaser of land has been held bound to inquire of the tenant in possession the nature of his interest.

A mere deposit of deeds, even without a word, may constitute an equitable mortgage, but it can only occur, as against strangers, in cases where the possession of the title deeds can be accounted for in no other manner, except from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and to the lands.

ments urged in support of them, are so fully gone into by the Lord Chief Baron, in delivering his judgment, that any further statement of them is unnecessary.

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THE LORD CHIEF BARON.—This bill is brought to enforce an equitable mortgage, averred to be made by a deposit of deeds; and it prays, amongst other things, that the defendants may pay to the plaintiffs the amount of their debt, by a time to be appointed, or, in default thereof, they may be decreed to convey the legal estate in the subject of the alleged mortgage to the plaintiffs, or as they shall direct. The transactions out of which the claim arises, are long and intricate. Many deeds, and some correspondence and parol testimony have been resorted to in the argument. I have thought it necessary to look into the whole, that, in disposing of the case, I might be confident I had obtained a minute as well as a comprehensive view of all the facts bearing upon it.

7 Har. 357.
1 G. 2 Holl & 309

The plaintiffs are solicitors. There is in the county of *Devon*, and at *Plymouth Dock*, or its neighbourhood, a brewery called the *Tamar Brewery*. In the year 1814, the partners in this concern were *Bartholomew Boyle Thomas*, *Thomas Franklyn* (a person examined upon this record as a witness), and one *George Squire*, now deceased. *Thomas Franklyn*, whose transactions have laid the foundation of this cause, had two-sevenths of the concern, and *B. B. Thomas* and *G. Squire* had the other five-sevenths. These partners were the legal owners of the leasehold premises used as public-houses, and the subject of the equitable mortgage which it is now endeavoured to establish. Finding their affairs were very deeply embarrassed, Messrs. *Thomas*, *Franklyn*, and *Squire*, enter into an agreement for the purpose of arranging them. This agreement is dated the 6th *August*, 1817, and was made between *Thomas* of the one part, and *Franklyn* and *Squire* of the other; and by it they agreed that the actions at law and suits in equity then depending between them, should be

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settled; that the partnership between *Thomas, Franklyn, and Squire*, and another partnership between *Franklyn and Squire*, should be dissolved; and that all the debts, assets, and credits, of both these partnerships, should become the exclusive property of *Thomas*; who, on the other hand, agreed to pay the debts ascertained by the schedule annexed to the agreement, which were supposed to be all the debts due from the partnership: *Franklyn and Squire* indemnifying *Thomas* against all other debts contracted by them, except certain specified demands treated as not being properly partnership debts, but to which they were jointly liable. These debts *Thomas* took upon himself; and all the profits that had arisen from the time *Franklyn* became a partner, were to be accounted for to him; and he undertook to pay to *Franklyn* the amount of what *Franklyn* had paid for his share, *viz.* 3,714*l.* minus the amount of what *Franklyn* should appear to have drawn out during the partnership on his private account and applied to his private use. The agreement then recited, that the title-deeds of three of the public-houses in question, and which were to pass to *Thomas* as part of the partnership assets, were lodged with Messrs. *Husbands, of Plymouth*, bankers, as a security for money advanced by them to *Franklyn and Squire*; and that *Husbands*, having a judgment for the same debt, had issued execution, and sundry effects, part of the *Tamar Brewery*, were taken by the Sheriff and sold, but the money had not been paid over; and it then stipulated, that the money should be paid to *Husbands*; that *Thomas* should discharge the remainder of the debt to *Husbands*, so as to liberate the deeds pledged, and that thenceforth those deeds, and the premises to which they related, should be considered as pledged to *Franklyn* for the sums agreed by that instrument to be secured to him. In pursuance of this agreement, in the following year, the debt to Messrs. *Husbands* was discharged, and the present plaintiff, *John Wells Bozon*, who was *Husbands'* solicitor, gave his receipt for the amount, and acknowledged having

received of *John Ellis*, Esq. 1,888*l.* the balance due from *Franklyn* and *Squire*, for the use of Messrs. *Husbands*. This receipt is dated the 7th *May*, 1818. *Boxon* also, at the same time, signed the following acknowledgment:—

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“ *London*, 7th *May*, 1818.

“ The deeds of the public houses, the property of Messrs. *Thomas*, *Franklyn*, and *Squire*, lodged in the hands of Messrs. *Husband and Son*, are now in my possession, as *Franklin’s* solicitor, under the agreement of the 6th *August*, 1817.”

I consider this as an important document, because *John Ellis*, who paid the money, was a solicitor himself engaged in these transactions, and one of the conveying parties to the defendants. Its importance arises from the question of notice, because it gives a colour and construction to much of the evidence introduced upon that question. Persons who were told that the deeds were in *Boxon’s* possession (if circumstances led them to a communication with *Ellis* upon this subject), were fully entitled to presume that *Boxon* held them upon the footing of this acknowledgment, that is, for *Franklyn*, and as his solicitor. It then appears that the plaintiffs being solicitors and about to dissolve their partnership, and having a large sum (*viz.* 1,164*l.* 15*s.* 5*d.*) due to them on account of business done for *Franklyn* and *Squire*, applied to *Franklyn* for payment. He, they say, not having the means of payment, in *November*, 1819, consented that they (the plaintiffs) should hold, as equitable mortgagees, the leases and title-deeds of the three public houses before alluded to, by way of security for their debt, and that the same should be paid out of the monies secured to *Franklyn* by the agreement of the 6th *August*, 1817.

The transaction with *Franklyn* in 1817, left *Thomas* in sole possession of the brewery and its appurtenances. He appears immediately to have required assistance. In 1818, we find him in partnership with *Ellis* and *Corbie*;

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a bankrupt in 1820, but contesting the commission. At the end of 1820, *Corbie* withdrew from the partnership, and *Ellis* alone remained. He seems, at that time, to have been a mortgagee of the plant, these leaseholds, and other premises. The two defendants, *Williams* and *Welbore Ellis*, appear to have severally made large advances to *Ellis* and the persons engaged in the partnership, and, as a mode, I presume, of recovering back their money, they agreed to purchase the whole concern. This was afterwards carried into execution by agreement, dated 6th *November*, 1821. And by indenture dated 1st *April*, 1822, *Thomas* assigns all his interest in the leaseholds to the defendants; and their title is confirmed by indentures of lease and release of the 20th, and 21st *July*, 1823, between *John Ellis* of the one part; *Ramsbottom* of the second part; one *Woolley* of the third part; *Corbie* of the fourth part; *Everett* and Co., bankers, of the fifth part; *Williams* and Co., bankers, of the sixth part; and the defendants *William Williams*, and *Welbore Ellis*, of the seventh part; all of whom thus concur in making a title to the defendants. This deed is particularly pointed out on the part of the plaintiffs, in order to notice an admission contained in it on the part of *John Ellis*, that he was not then in a condition to assign and deliver the leases of the public-houses in question to the defendants, but which unquestionably refers to *Franklyn's* lien upon them. We come next to the transaction of 1824; the arrangement between *Franklyn* and the defendants, upon which, in a great measure this cause depends. *Franklyn* sold them all his interest for 1,500*l.*, of which the greater part was to be applied in satisfaction of certain debts owing from *Franklyn*. This arrangement was reduced into writing, in an agreement dated 26th *February*, 1824, and made between *Joseph Carter Wood*, and *Franklyn*, but which did not contain the slightest reference to any charge or lien created by *Franklyn* on any of the public houses in

question, and which was followed by a series of deeds, all dated on the 1st *June*, 1824. Exch. Ch. in Eq.
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The first question mooted upon these facts, was, whether *Franklyn* was not a necessary party to the suit. The opinion I have formed upon the merits relieves me from the necessity of considering that point. The merits are, whether the plaintiffs are equitable mortgagees, and entitled to relief against the defendants, in consequence of their having notice of the deposit. There seems no reasonable doubt that the plaintiffs are equitable mortgagees as against *Franklyn*, and entitled to all the remedies attached to that character. It is nevertheless surprising, that the plaintiffs, being *Franklyn's* solicitors, and perfectly apprized of *Franklyn's* embarrassed situation, should rest a fact so important to their security upon parol testimony only, and that, accidental conversation. The original conversation in which the contract was made, seems to have passed in the presence of *Boxon* and *Franklyn* alone.

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The next question is on the notice. Here, before adverting to the evidence, it is proper to explain, that I think notice of *Boxon's* possession of the title-deeds, and notice of the debt from *Franklyn* to *Boxon* are not, either severally or conjointly, that notice which will entitle the plaintiffs to the relief they ask by this bill. The possession of the client's deeds by his solicitor is so usual, so much in the ordinary course of transactions, that there is nothing in it which should put a purchaser upon inquiry; but, in this case, there is still less in that circumstance, because *Ellis*, from whom the defendants bought, was in the actual possession of a written acknowledgment from *Boxon*, that it was as solicitor for *Franklyn* that he held those deeds. Notice of the fact that *Boxon* had the custody of the leases was so far from imposing upon *Ellis*, or *Thomas*, or the defendants, the duty of inquiring upon what terms *Boxon* held them, that, in my opinion, the moment *Boxon* acquired, by contract

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with *Franklyn*, an interest in the leaseholds beyond what his character of solicitor conferred, it became incumbent upon him to communicate the fact to *Ellis*, or *Thomas*, or the defendants, or whoever was in the visible ownership of the *Tamar* Brewery, and its appurtenances. It is to him, and not to the other side, that *laches* is to be imputed at this period of the transaction.

Then, as to notice of the fact that the plaintiffs had a demand for business upon *Franklyn*, that is not, any more than the other, the notice requisite to the plaintiffs' case: it stops short of what they must shew. If the point now in discussion were whether the Court ought to compel the plaintiffs to deliver up the leases to *Williams* and *Ellis*, the notice of the debt might be material; but the present question is, whether the Court shall establish the plaintiffs' claim against the land. My opinion is, that the plaintiffs, to succeed in this suit, must fix upon the defendants actual or constructive notice of the agreement between *Franklyn* and the plaintiffs, by which the deeds were to remain in their custody, as a security for their debt. They say this is done; it is for me to examine how far this assertion is borne out by facts. The defendants upon their oaths deny it distinctly and positively; it must therefore be proved against them by two witnesses; or, at least, by one witness and circumstances, and in such a way as to establish it satisfactorily. *Franklyn* is, I think, the only witness who, by parol, proves direct personal notice upon either of the defendants. His competency was objected to, perhaps with justice, but I shall dismiss the question, because his deposition was read, and a slight examination will shew how little reliance can be placed on it. What I shall first particularly point out, is evidence favourable to the defendants: I select it because it is of the highest character; I mean the deeds which passed under *Franklyn's* hand and seal. The first and most important deed is the general agreement between *Franklyn* and the defendants, dated the 1st of *June*, 1824. This in-

strument contains a recital of the leases and an agreement on the part of *Franklyn*, to assign them to the defendants, but without the least intimation that they were subject to any such charge as that to which *Franklyn* now swears, and of which he pretends he had given them express notice. The instrument contains also a recital that *Franklyn* was indebted to various persons, of whose names he had delivered a list to the defendants, and the defendants covenant with *Franklyn* to discharge those debts; but here again there is no intimation that any of the creditors had a charge or lien upon the premises.

It may perhaps be doubtful, upon the circumstances, whether or not *Franklyn* can sustain an action upon this covenant, against the defendants, for not relieving him from the plaintiffs' debt; it is no part of my duty now to discuss that question. The important observation is, that though *Franklyn* insists, with some colour, that, in this clause, he was stipulating with the defendants for the payment to the plaintiffs of this identical debt, there is not the slightest allusion to any charge or lien for securing it. How are these omissions to be accounted for? And with this deed in my hand, what reliance can I place upon *Franklyn's* testimony, when he deposes, not only to the fact of the equitable mortgage, but, in opposition to the oaths of the defendants, swears that he had given the defendants clear and distinct notice of it? The effect of these instruments does not stop here; the leaseholds are actually assigned to the defendants by a separate deed of the same date, and which deed, containing, as it does, covenants against existing incumbrances, and for further assurance, is totally inconsistent with his story. How is it possible to suppose, that, previous to executing these deeds, *Franklyn* had actually communicated to *Williams* the equitable charge now in question, and that *Williams* accepted the property with this charge? I cannot hear it said that *Franklyn* did not know what he signed. That is to be listened to only where fraud or imposition is

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charged; but there is not in this case the least colour for such an imputation. I must consider these documents, therefore, as contradicting the testimony of *Franklyn*, and strongly confirming the answer of the defendants. The next document used in the argument which I shall notice, is the list of debts signed by *Franklyn*, and produced from the custody of the defendants, and in which the plaintiffs' claim on *Franklyn* is stated. I assume this paper to be the list of *Franklyn's* debts referred to in the agreement of the 1st of *June*, 1824, and which debts the defendants covenant with *Franklyn* to discharge. This is said to afford evidence that the defendants had notice of the deposit: it shews that they knew of a claim by the plaintiffs upon *Franklyn*, but nothing more. There has been certainly some misunderstanding, but there is not in the list the slightest allusion to the lien or charge now in question, or to the contract of deposit; an omission which seems to me irreconcilable with *Franklyn's* testimony, that he had spoken of it openly to *Williams*.

For the purpose of proving their proposition, the plaintiffs also resort to two letters, one dated in *November*, 1823, from *Franklyn* to *Amory*, the solicitor of the defendants, and the other from *Franklyn* to the defendant *Williams* himself. The expressions in both these letters are sufficiently accounted for by the treaty for the liquidation of *Franklyn's* debts, and the known and acknowledged fact that *Bozon* had the custody of the leases as *Franklyn's* solicitor. In the letter to *Amory*, is a statement by *Franklyn* of his debts, and of the measures he had taken to compromise them. If it had *not* been known that *Bozon* had the leases as *Franklyn's* solicitor, and that he had a demand upon *Franklyn*, the expression in this letter might have put *Amory* upon inquiry, but they appear to be quite satisfied by these two facts, and did not in the least suggest a contract of equitable deposit, or any thing beyond the possibility of the common lien of an attorney, a claim quite different from that which is now contended

for. The letter to *Williams* contains also a list of *Franklyn's* debts, and only mentions the plaintiff's demand among them, without referring to the leases at all. The observation upon it is, therefore, feebler than upon the other letter.

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Another fact pressed upon the Court on this subject is a pencil memorandum, proved to be the hand-writing of Mr. *Amory*, on a schedule to a deed, between *John Ellis* (the person to whom *Bozon* gave the acknowledgment that he was in possession of the deeds as solicitor to *Franklyn*,) and the defendants, with several other persons. It appears that *Ellis* had, in the course of these transactions, become the proprietor of this brewery, and acquired an important interest in its appurtenances, and, among others, the public houses, the subject of this cause. The defendants, having made large advances, were desirous to purchase the concern, and a deed is entered into between *Ellis* and the defendants for that purpose. It is dated the 6th November, 1821, and by it *Ellis* agrees to sell to *Williams* and *Ellis*, at a valuation, his interest in the leases, stock, &c., mentioned in the second schedule to the said indenture; and the indenture contains a covenant that the third schedule is a true and perfect account of all the charges and incumbrances on the premises, of which he (*Ellis*) had any notice, except such as are specified in the body of the deed. Now, there is no allusion, either in the deed or in the schedule, to the plaintiff's debt; which very clearly shews that *Ellis*, who was an attorney, and who was in the actual possession of *Bozon's* written acknowledgment that he held the indentures of lease, did not understand that this possession was coupled with an equitable mortgage of the messuages. The pencil-mark on the schedule used for the plaintiffs, is represented to amount to an admission of notice of the equitable mortgage now in question, in opposition to *Amory's* denial con-

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tained in his deposition. But it is impossible to draw any such conclusion from it. Inferences from extraneous facts, impeaching the truth of a solemn denial upon oath, ought at least to be clear and direct; and such can hardly be said to belong to the memorandum in question, even supposing it was both distinct and intelligible, which it is not. I find myself quite unable to say of what words it is composed; nor can I, in any way, determine what *Amory* meant by it: it is sufficient, for the present purpose, to say, that it conveys no distinct intimation respecting the present subject, and, if it did, would carry it no further than to an attorney's claim of lien on his client's deeds. And I may add, by the way, that, if *Amory* merits credit, the plaintiff's first open claim was a claim of this description, and not the claim made upon this record.

The next circumstance relied upon by the plaintiffs, as evidence of notice, is the deed of the 21st *July*, 1823, to which the defendants are parties: it is the assignment from *John Ellis* and others, to *Williams* and *Welbore Ellis*, the defendants. It is there recited that *John Ellis* was not in a condition, at that time, to assign and deliver the leases in question, with some others, to *Williams* and *Welbore Ellis*; and the notice of this incapacity, which the recital demonstrates, is treated as notice of this supposed equitable mortgage. Whereas, it is quite obvious that this recital must have had in view *Franklyn's* claim under the agreement of *August*, 1817, which, to the knowledge of all the parties, limited and fettered *John Ellis's* power over these leases, but goes no step beyond it. This is too clear for discussion.

It has been argued, that these circumstances, or some of them, if they do not amount to notice, placed the defendants under the necessity of inquiring of *Boxon* on what terms he held the leases, in which case they would have obtained the notice; and, in support of this argu-

ment, *Daniels v. Davidson* (a), and other cases establishing that proposition, were cited. That proposition is, that, if a purchaser of land sees a tenant in possession, he is bound to inquire of that tenant what his interest is, and, if he does not, he must take the consequences. If the present case ranged within that class of cases, I should come to the conclusion which the plaintiffs desire; but it seems to me of an entirely different description. A tenant seen in the actual possession of the land may have in it almost any extent of interest: he may be tenant from year to year, for any number of years, for life or lives; or he may hold under an agreement upon any conditions. It would be highly inequitable that he should not have the just benefit of his previous contract, when the purchaser knows that the tenant has some interest or other, without knowing what, and not only has the means, but is called upon to ascertain what it is. In the present case, the plaintiffs have no possession denoting any interest in the land; they had the parchments, and had them naturally as the law-agents of the owner; and they held this out under their hands to all concerned.

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Again, it is stated to have been decided, that the mere deposit of deeds constitutes an equitable mortgage, even without a word being said; and from this it is argued, that, when the defendants knew the plaintiffs had the deeds, they should have inferred that it was as mortgagees. Where it has been so decided, it has always been, where the possession could be accounted for in no other way, or the holder was otherwise a stranger to the title and the lands. I concur entirely with those eminent persons who regret the inroad which the doctrine of mortgage by mere deposit has made upon the wise provisions of the statute of frauds. So far as it has been carried by a course of decision, I think it my duty to follow, but no further. It

(a) 16 Ves. 249.

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does not appear to me to be just, in support of such a doctrine, to strain equivocal circumstances into evidence of notice most positively denied upon oath, and to impose upon a purchaser, in favour of a solicitor, the task of asking that solicitor whether the representation made by him, under his hand, is true or false. In truth, I think the negligence is to be imputed to the plaintiffs. They were so connected with *Franklyn*, and with the concern of the *Tamar* Brewery, that they could not have been ignorant of what was passing. They must have known of the various transfers which took place. No other person is brought forward as the solicitor of *Franklyn*. It is marvellous that it did not occur to them after the equitable mortgage was made, as they say, to give a formal and a written notice to some of the parties through whose hands the concern passed, of the change in their situation, and that they were become equitable mortgagees, by a secret conversation, and were no longer mere solicitors in possession of their clients' papers. The liability of the defendants to *Franklyn* upon the covenant contained in the agreement of *June*, 1824, and their right to a decree for delivery to them of those deeds without paying the debt, the subject of the covenant, are questions which do not arise in this cause. As notice is not established, I am of opinion the bill must be—

Dismissed, with costs.

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JOHN GROVES v. LEVI GROVES.

1828,

Nov. 25th.

1829,

Feb. 3rd.

THE bill stated an indenture, dated 31st *December*, 1812, made between *John Gladwyn*, of the first part; the plaintiff, of the second part; the plaintiff's late brother, *Simon Groves*, of the third part; *Thomas Fox*, Gentleman, of the fourth part; *John Golding*, of the fifth part; and *Barnck Fox*, of the sixth part; by which, in consideration of the sum of 500*l.* paid by the plaintiff to *John Gladwyn*, and of the sum of 250*l.* therein expressed to be paid by *Simon Groves* to *John Gladwyn*, *John Gladwyn* granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, unto *Thomas Fox*, and his heirs, divers hereditaments and premises therein described, (that is to say), certain premises therein mentioned, as agreed to be purchased by the plaintiff at the price or sum of 500*l.*, as also certain premises agreed to be purchased by the said *Simon Groves* at the price or sum of 250*l.*, to hold the former premises to the uses therein mentioned, but to hold the other premises, that is to say, those agreed to be purchased by *Simon Groves* at the price of 250*l.*, to such uses as the said *Simon Groves* should, in manner therein mentioned, appoint; with remainder to the use of the said *Simon Groves*, and his assigns, for his natural life; remainder to the use of the said *Thomas Fox*, and his heirs, during the natural life of the said *Simon Groves*, in trust, for the sole benefit of the said *Simon Groves*, to the intent that any wife of *Simon Groves* might not be entitled to dower; with remainder to the use of the heirs of the said *Simon Groves*, for ever: and a fine, levied pursuant to a covenant in the said indenture. The bill further stated, that although

Bill for the conveyance of an estate, alleged by the plaintiff to have been purchased and paid for by him, and to have been conveyed to an ancestor of the defendant, as a trustee for the plaintiff, dismissed, but without costs; there being no written agreement or declaration of trust, signed by the defendant's ancestor, and no actual evidence of the payment of the purchase money by the plaintiff; though there was evidence of constant possession by the plaintiff, and of conversations in which the defendant's ancestor had stated that the plaintiff had purchased the property in his name, with a view of giving him a vote for the county; this evidence was however rather contradictory.

Semble:—that this Court will not assist a party

in getting back an estate conveyed by him for an illegal purpose, as, to enable the grantee to vote at an election, or to sit in Parliament, even though it has not been used for the illegal purpose.

The Court will not, generally speaking, enforce an agreement wholly voluntary, and without consideration.

J. O.

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it was in the said indenture expressed that *Simon Groves* had agreed to purchase, at the price of 250*l.*, the meadowland therein described; yet the fact was, that the purchase of the said premises was made for and on behalf of the plaintiff; and the 250*l.*, the purchase-money for the same, was paid to the said *John Gladwyn*, not with or out of the monies belonging to the said *Simon Groves*, but with and out of the proper monies of the plaintiff, and the agreement and understanding between the said *Simon Groves* and the plaintiff was, that *Simon Groves*, though the conveyance was made to him as aforesaid, was to hold the premises so conveyed to him, as a trustee for plaintiff, and was to execute a proper conveyance thereof to plaintiff, or as he should direct, when called upon so to do; and he accordingly made and signed one or more acknowledgments or memorandums in writing to that effect; that *Simon Groves* really was a trustee for plaintiff of the premises so purchased of the said *John Gladwyn* at the price of 250*l.*, and conveyed to the said *Simon Groves*; and that *Simon Groves* never was in, or ever entered into, the possession of the premises so conveyed to him, or into the receipt of the rents and profits thereof, or of any part thereof; but, on the contrary, the plaintiff, as the owner thereof, upon the said purchase thereof being made, entered into possession thereof, or into the receipt of the rents and profits, and had ever since continued, and still was, in such possession or receipt; that *Simon Groves* died on the 6th day of *January*, 1823, intestate, leaving the defendant, his nephew and heir-at-law, upon whom, as such heir-at-law, the said premises descended: but the defendant, knowing that *Simon Groves* was a trustee thereof for the plaintiff, after the death of *Simon Groves*, and on the 20th *February*, 1824, signed an acknowledgment or undertaking in writing, respecting the said premises, to the following effect:

“ I acknowledge that the close of land, an allotment on

“ *Little Common*, in *November*, 1812, conveyed by Mr. *John Gladwyn* and others to my late uncle *Simon Groves*, was
 “ paid for with the money of my uncle *John Groves*, and
 “ was so conveyed to my said uncle *Simon*, to make him
 “ a vote for the county; and I, having no claim to the said
 “ land, excepting as heir-at-law of my uncle *Simon*, do
 “ hereby agree to convey it to my uncle *John*, when re-
 “ quired by him to do so, without any further considera-
 “ tion; but my said uncle *John* is to indemnify me from all
 “ expense of the conveyance. Dated 20th *February*, 1824.
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Levi Groves.”

Witness to the signing } *S. Luckham*,
 of the above. } *Gerd. Sampson.*

The bill prayed that the defendant might be decreed to execute a proper conveyance to the plaintiff, or as he should direct, of the premises, and an injunction to restrain the defendant from proceeding in ejectment.

The defendant, by his answer, denied all knowledge of the circumstances under which the property was purchased and conveyed to *Simon Groves*: and contended, that *Simon Groves* was the actual owner of the premises, and in the possession thereof; and that, upon his decease, the premises descended to the defendant as his heir-at-law. The defendant admitted, that, after *Simon Groves's* death, he signed the acknowledgment set forth in the bill, but alleged that he signed the same through ignorance of the facts, and in reliance on the representations of the plaintiff, as to the circumstances under which the property had been purchased and conveyed; which representations he had since discovered and believed to be wholly untrue: and that he was induced to sign such acknowledgment, and to trust to the representations of the plaintiff, in consequence of the promises and assurances of the plaintiff, that he would assist him in his trade.

Both parties entered into evidence. The general effect

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of the evidence being detailed in the judgment, it is sufficient to state, that the plaintiff proved the execution of the conveyance; the payment by him of the expenses of the conveyance; that he had always been in possession; that *Simon Groves* had never been in possession; and that, in conversation with various persons, *Simon Groves* had repeatedly stated that the land was his brother's (the plaintiff's), and had been bought in *Simon Groves's* name, for the purpose of giving him a vote for the county. The evidence also tended to negative any fraud on the part of the plaintiff in obtaining the acknowledgment from the defendant. The defendant examined several persons, to prove declarations, both by the plaintiff and the defendant, that the land in question was the property of *Simon Groves*, and that the plaintiff was in possession only as tenant to *Simon Groves*.

Mr. *Jervis*, and Mr. *Loat*, for the plaintiff.—The defendant, having signed an acknowledgment that he is a trustee for the plaintiff, cannot now relieve himself from that admission. This case is stronger than *Gascoigne v. Thuring* (a), in which the evidence was not sufficient to establish the trust. In *Curtis v. Perry* (b), the Court, it is true, would not interfere where ships had been registered in the name of another person, with a view of enabling the real owner to employ them in contracts with government, which, as a member of Parliament, he was restricted by law from doing. But the distinction between that case and the present is, that there the illegal purpose had been answered, here it has not; for *Simon Groves* never voted in respect of this property. In *Ward v. Lant* (c), where a father executed a bond to his daughter, to avoid the payment of taxes, but always kept it by him, the Court consider-

(a) 1 Vern. 366.

(b) 6 Ves. 740.

(c) Prec. in Chancery, 182.

ed it as an incomplete transaction, and thought that, if the daughter had obtained possession of the bond, relief would be granted against it. And in *Birch v. Blagrove* (a), where a man made a fraudulent conveyance of his estate, thinking that, by so doing, he might swear to his want of qualification to serve the office of Sheriff, but did not in fact take the oath, and afterwards paid the fine, and by his will devised the estates, the Court relieved against the conveyance, the illegal purpose for which it had been executed not having been answered. So, in *Platamore v. Staple* (b), an injunction was granted, to restrain the defendant from suing for a rent-charge granted to qualify him to sit in Parliament, the purpose for which it was granted never having been answered.

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Mr. *Rose* and Mr. *Warry*, for the defendant.—The question is, whether there is such a resulting trust for the plaintiff as entitles him to come into this Court for a conveyance. To entitle him to the assistance of this Court, he should come with clean hands, which he does not; for, according to his own witnesses, this conveyance was made for a fraudulent and illegal purpose. There is no evidence that the estate was purchased with the plaintiff's money. The assertion that the conveyance was made to *Simon Groves*, with a view of giving him a vote for the county, is wholly at variance with the uses declared by the conveyance; for the same object might have been effected by giving *Simon Groves* only a life estate. There can be no trust without a writing, unless it arise by operation of law. In the present case, there is no declaration of trust in writing, nor is there any resulting trust by operation of law. The circumstance relied on, that the conveyance was to give a colourable vote for the county, is directly opposed to any resulting trust by operation of law, for to operate such a

(a) Ambl. 264.

(b) Coop. C.C. 250.

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trust, the Court must give effect to an illegal transaction. There can be no resulting trust arising by operation of law, except where the purchase money is paid by one person, and the legal estate is in another, or where a trust is declared only as to part, and nothing said as to the rest. *Crop v. Norton* (a), *Lloyd v. Spillet* (b). In the present case, there is no evidence that the purchase money was paid by the plaintiff.

Perhaps the Court would not assist the defendant, but that is no reason why it should interfere for the plaintiff. In *Curtis v. Perry* (c), the Court refused to give effect to an illegal transaction. In *Cecil v. Butcher* (d), the Court declined to give relief upon the loss of a conveyance executed to give a colourable qualification to kill game, but retained the bill for a year, with liberty to bring an action. *Gascoigne v. Thuring* has no application. The undertaking by the defendant must be wholly thrown out of the case, being without any consideration; and the Court will not enforce an agreement or undertaking not founded on consideration.

Mr. *Jervis*, in reply.—*Crop v. Norton* does not apply. The clue to all the cases on this subject is, whether the illegal purpose has been effected. In *Gascoigne v. Thuring*, there was not sufficient evidence to establish the trust. In this case, there is abundant proof. The agreement signed by the defendant renders the present much stronger than any former case.—*Brackenbury v. Brackenbury* (e) was also cited in the reply.

(a) 2 Atk. 74.

This case is reported rather differently in 9 Mod. 233. From an observation of Lord *Hardwicke* in this case, it seems to have been doubted whether there was a resulting trust in the case of a joint advance, where the purchase was

made in the name of one. That there is such a resulting trust, was decided in *Wray v. Steele*, 2 Ves. & B. 388.

(b) Id. 148.

(c) *Supra*.

(d) 2 Jac. & Walk. 565.

(e) 2 Jac. & Walk. 391.

The LORD CHIEF BARON (*after stating the pleadings and the evidence*).—The result of the evidence is, that no agreement signed by *Simon Groves* appears; and I am bound, from the evidence, to assume that there never was any such agreement. The evidence does not prove that the plaintiff actually paid the purchase-money for the land in question. *Fox's* evidence comes nearest to this point. He proves that he was the attorney employed in the transaction, and that he was employed by *Simon Groves* to convey the land to him; and that, at the completion of the purchase, it was stated to him by *Simon Groves*, in the presence of the plaintiff, that he (*Simon Groves*) bought the land to make himself a freeholder for the county. This is the best, and I may say the only evidence respecting the payment of the purchase-money. There is abundant evidence that *Simon Groves* in conversation often said that he had not paid any part of the purchase-money; and one witness adds, that *Simon* also said that the plaintiff had often requested him to make a will and devise the land to one of the plaintiff's sons, and to tell him to which of the plaintiff's sons he devised the same, in order that the plaintiff might take it into consideration in the disposal of his property, so as to make his children equal; and that *Simon Groves* also said, that he believed the plaintiff had another motive for having the land conveyed to him, besides making him a vote for the county, *viz.* in order to induce him, *Simon Groves*, to make a will, the plaintiff knowing that a former will, by which he had bequeathed the principal part of his property to the plaintiff and his children, had, in consequence of a dispute between them, been destroyed. There is also some evidence as to the possession of the property. The fair result of which is, that the plaintiff has, ever since the purchase, had possession of the property; and it certainly does not appear that he ever paid any rent. The plaintiff has, however, some advantage in this part of the case, because he has all *Simon Groves's*

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papers in his possession, being his personal representative. If the cause turned upon this fact, I would put it into some course of inquiry; but my opinion on other points renders this immaterial. On the other hand, a witness, of the name of *Legg*, swears to a conversation of the plaintiff's, in which he represented that the land was bought with *Simon's* money. I mention this only to shew the mischief and danger of this species of testimony. There is abundant proof that *Simon Groves* was a person in good circumstances.

The first question is, what relief the plaintiff is entitled to on the agreement or undertaking signed by the defendant. And I will at once state my opinion, that, if the plaintiff could remove the objection which arises to this instrument from the want of consideration, still the circumstances under which it appears to have been obtained are such as would not entitle him in a Court of equity to derive any benefit from it. But, independently of these circumstances, there is an insuperable objection to the relief sought by this bill as founded on that agreement, namely, that the agreement was purely voluntary and without any consideration, and, therefore, cannot, of itself, support either a bill or an action. The plaintiff must, therefore, stand or fall by his original case, unaided by, and independent of, the acknowledgment signed by the defendant. The case which he must set up and rely upon, is, that he paid the money, though the conveyance was made to *Simon Groves*; and, therefore, that there was a trust by operation of law for him, and, as a consequence, that he has a right to call for a conveyance.

There can be no doubt, that when one man pays for an estate, and has it conveyed to another, that the grantee, who has the legal estate, is a trustee by operation of law for the purchaser. But I conceive that the fact must be distinctly established by satisfactory evidence. Here, it is not so established. The payment of the money is not traced

in any manner. As I have already stated, all we know on this subject is from *Fox*, the attorney, who says that he was employed by *Simon* to convey the land to him, and that, at the completion of the purchase, when *Simon* paid for the land, he, *Simon*, said, in the presence of the plaintiff, that he, *Simon*, bought it to give him a vote. What have we to disprove this? Any evidence that it was paid by a draft of the plaintiff on his banker, or by a bill traced into his hands, or in any other analogous way? No, nothing but loose conversations of *Simon's*, proved by parol testimony, the most dangerous of all evidence upon such a subject.

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It appears to me, that, in refusing to act upon such evidence, I follow a wise example set me by the Court of *Chancery* in the case of *Gascoigne v. Thuring*, in which the Master of the Rolls of that day refused to relieve in a case parallel to the present upon evidence of a similar description. It appears that the plaintiff has constantly possessed the lands, which is a circumstance favourable to him, though it may be easily accounted for, as he possessed adjoining lands. But the material circumstance is, that there is an absence of all evidence of payment by him of rent: this is, however, entitled to little weight, because the plaintiff has the whole evidence upon that subject, being the administrator of his brother, and having all his papers in his own hands. It would not be just, therefore, to rely against the defendant upon the obscurity as to settlements for rent; and, if I did, it would not be sufficient to establish the proposition which the plaintiff must make out. But the conversations on which the plaintiff relies, introduce a circumstance which ought also, as it seems to me, to defeat his equity, *viz.* that the plaintiff's conduct shewed that, at the time of the transaction, he did not understand that his brother *Simon* was a bare trustee for him. He meant to get at this land in another way, by *Simon's* devise in favour of one of his own sons, or, perhaps, by ingratiating himself with his brother, to obtain, by will, more of

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his property. Now, if such were his views at that time, he could not afterwards, by a change in his intention, turn *Simon* into a trustee for himself.

I think, that, if I am to consider the money as having been advanced by *John*, then the same conversation of *Simon*, which is the only evidence of that fact, tends to raise a strong presumption that, according to the understanding of the parties at the time, the transaction was not revocable at the will of *John*. I admit that *Simon's* conversation would not be evidence for his heir, if it were not that, according to the fair construction of this record, and of these depositions, it is part of the same conversation which is in evidence against him. I think they are connected together. This view of the case is strongly confirmed by the plaintiff's acquiescence. He never made any demand, as far as appears, during the life of *Simon*. The transaction occurred at the end of 1812, and *Simon* lived till 1823. The plaintiff made no request for a reconveyance during the eleven years, and never, till, by *Simon's* death without a will, it was discovered that the plaintiff took nothing by devise from him. Upon that ground, also, I think I ought not to give this relief.

There still remains the objection arising from the illegal purpose for which, according to the plaintiff's own case, the conveyance was made. For the defendant, it has been said, that, supposing it satisfactorily proved that it was the plaintiff's money which paid for this purchase, and that there was no reason to believe that it was meant as a gift to *Simon*; and consequently, that, upon the acknowledged equity, *Simon* ought to be considered as trustee for the plaintiff, and therefore bound to reconvey; still, that the illegal purpose for which the conveyance was made bars that equity. And so at first sight it would seem. But the plaintiff replies that the illegal *purpose alone* is not sufficient to bar that equity: that the purpose must be accompanied by the completion of

that purpose, and the deed must have performed its office. There is some colour for this argument. The first case cited is *Birch v. Blagrove*. In that case, a citizen of *London* wishing to avoid fining for the office of sheriff by reducing his property, executed a voluntary conveyance to his daughter, but kept it in his own possession, never communicated it to the grantee, lived for years as owner, sold part of the estates, and in the interval actually avoided the office of sheriff by paying the usual fine. He devised the estate, and the contest was between the conveyance and the devise. The devise prevailed. Lord *Hardwicke's* decree is expressed with caution. He declares that the deeds proceeded from and were founded in a mistake in the testator, and were made for a particular purpose that never took effect, and, therefore, that the trust and beneficial interest in equity remained in himself. Now, certainly, the distinction is broad and obvious between a deed contrived for a purpose, which purpose is entirely in the breast of the maker, and to be executed by him or not at his sole pleasure, and of which the grantee never had any notice, and a conveyance made with the privity of the grantee and in his presence, and which was to answer the secret purpose at the will of the grantee, and of which the use and effect were in the breast of the grantee and not of the grantor, and that during the period of eleven years. The case, therefore, itself is no authority for the present; and I should not have considered it of any importance, if Lord *Hardwicke* had not been reported to have said: "Such was the case of Colonel *Pitt*. He sat in the House by virtue of the conveyance. Suppose *George Pitt* had found his mistake, and repented before he carried his intention into execution, I should have thought a contrary determination would have prevailed." In subsequent cases it has been said, that probably in Mr. *Pitt's* case the qualification had been given upon a condition that the donee should come into Parliament; and if he had not, then the trust would have re-

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mained in consequence of the condition having failed. We do not know, at least I do not know, the circumstances of the case to which Lord *Hardwicke* refers; but suppose, which does not seem impossible, that the father intending to support his son or relation in obtaining a return to Parliament, had given him a qualification to enable him to sit, and the donor immediately afterwards had altered his intention as to the seat, so that the conveyance became useless. Lord *Hardwicke's dictum* applied to such a case would not seem extraordinary. It would bring the case he put very close to the case which he decided, but it would go no way to the decision of the present cause. The only other cases that have been cited, which seem to me material to the present, are two before Sir *Thomas Plumer*—*Platamore v. Staple*, in which, without committing himself as to the ultimate result, he granted an injunction; and *Cecil v. Butcher*, in which the grantee was the actor, and prayed the aid of the Court, the deed being lost or destroyed, and the Master of the Rolls directed him to bring an action, and retained the bill for a year. I do not consider these two last cases as determining the course to be taken in the present. It appears to me, that if it turned only on the illegal object of the original transaction, I should act most consistently with law and equity by refusing to interfere, as Lord *Eldon* did in *Brackenbury v. Brackenbury*. When a grantor, so far as he can, completes the transaction for an illegal purpose, and leaves it in the power of the grantee, during his whole life, to make, at his pleasure, the illegal use of the gift originally intended, he deserves all the consequences attached to the illegality of his act. If the crime is not completed, the merit is not his, and therefore, in such a case, I should not think myself bound to relieve him, against the heir of the grantee. The plaintiff asks for equity and does not come with clean hands to receive it. It appears to me that I ought to dismiss this bill upon every one of the three grounds to which I have referred:—*First*, Because the fact, that the

plaintiff advanced the money, is not satisfactorily proved;
 —*Secondly*, Because, if the plaintiff did in fact advance the money, there seems reason to suppose, that originally the parties did not understand that *Simon* was bound to convey the estate as and when the plaintiff should direct;
 —and *Lastly*, because the illegality of the plaintiff's original purpose should, under all the circumstances, prevent this Court from aiding him.

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I think the bill must be dismissed, but without costs.

PLAYFORD v. HOARE.

Feb. 2nd, 3rd.

THIS was a suit for the specific performance of an agreement for the purchase by the defendant of certain closes of land.

Devise to trustees and their heirs, during the life of *M. P.*, in trust, to lay out the rents &c., on government securities, to accumulate until she shall attain twenty-one, and from and after she shall attain that age, to suffer her to receive and take the rents, issues, and profits during her life, not subject to the control of any husband with whom she may intermarry; her receipt to be a sufficient discharge for the same; and from and after the decease of *M. P.*, to the heirs of the said *M. P.*, for

Mary Kirby, by her will, dated 21st February, 1775, executed and attested so as to pass real estates, (amongst other things), devised as follows:—" *Item*. All my messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being in *Sandy Strand*, in the county of *Norfolk* aforesaid, or in any other town or towns thereunto annexed or near adjoining, now in the tenure or occupation of *John Plumly*, his assignee or assigns, under-tenant or under-tenants, be the same freehold, copyhold, charterhold, or customary lands, with their and every of their appurtenants, all which last-mentioned lands of the nature of customary or copyhold I have surrendered to the use of my will, I give, devise, limit and appoint the same to the said *Henry Playford* and *Timothy Yates*, of *Saint Mary Hill, London*, hop-merchant, and their heirs,

ever:—*Seemle*, that the legal estate is vested in the trustees during the life of *M. P.*, and therefore, that there can be no union, under the rule in *Shelley's* case, of the legal estate in remainder to the heirs of *M. P.*, with the preceding estate for life, so as to give *M. P.* the fee.

Seemle, that an estate for life, executed by the statute of uses, cannot unite with a legal remainder by the rules of the common law.

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*6 Linn. 106,
1 Russ. 504.*

during the life of *Mary Playford*, daughter of the said *Henry Playford*, in trust to lay out the rents and issues thereof as the same shall be received, and also the interest and dividends which shall from time to time arise and grow due thereon, on government securities, until my grand-daughter, *Mary Playford*, shall attain her age of twenty-one years; and that they do, at and from my said grand-daughter *Mary Playford's* attaining her age of twenty-one years, suffer her to receive and take the rents, issues, and profits, during her life, and not subject to the debts or control of any husband which the said *Mary Playford* may marry; and the receipt of the said *Mary Playford* only to be a sufficient discharge for the same; and from and after her decease, I give and devise the same to the heirs of the said *Mary Playford* for ever."

The testatrix died in 1775; and, some time after her decease, *Mary Playford* attained her age of twenty-one years, and was thereupon let into the possession or into the receipt of the rents and profits of the several premises devised to her; and *Mary Playford* afterwards intermarried with the Rev. *Hugh Williams*, who died, leaving the said *Mary* his widow.

In 1810, the plaintiff purchased from *Mary Williams*, she being then a widow, the fee-simple and inheritance of certain parts of the premises devised to her, and the same were accordingly conveyed to him by *Mary Williams*, and he was thereupon let into possession or into the receipt of the rents and profits.

In *August*, 1827, the plaintiff entered into an agreement with the defendant, to sell to him certain parts of the premises purchased by the plaintiff from *Mary Williams*; and such agreement was reduced into writing, signed by the plaintiff, and by one *Francis Pank*, who was authorized by the defendant to sign such agreement on his behalf; and which agreement bore date the 15th of *August*, 1827, and thereby, among other things, a good title was stipulated to be made.

The point raised on the part of the defendant was, that the property, the subject of the contract, being part of the estates devised by the will of *Mary Kirby*, the limitation to the heirs of *Mary Williams* did not unite with the estate for life given by the same will to *Mary Williams*, but was a devise by way of contingent remainder to the person who, at the death of *Mary Williams*, might answer the description of her heir-at-law; and as *Mary Williams* was living, the vendor had only a life estate, and a good title could not be made. The short point, in other words, was, whether *Mary Williams* took the legal or only an equitable estate for life in the property, so as to bring the title within the rule in *Shelley's* case.

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Mr. *Simpkinson*, for the plaintiff.—It is clear, as a general proposition, that a devise to trustees, for the life of *A.*, in trust to permit *A.* to receive the rents and profits during his life, is a use executed. And if the limitation in this case had been in trust, on *Mary Williams* attaining her age of twenty-one, to suffer her to receive and take the rents for her life, there can be no doubt that it would have been a use executed, and that she would have taken the legal estate for her life; the only difficulty arises from the limitation being to the trustees, in trust, during the minority of *Mary Williams*, for accumulation, and, on her attaining twenty-one, to permit and suffer her to take and receive the rents during her life, for her separate use, free from the debts and control of any husband.

In *South v. Allen* (a), under a devise to a married woman of the rents and profits of an estate, during her life, to be paid by the testator's executors into her own hands, without the intermeddling of her husband, and after her decease, over; the wife was held by the Court of *King's Bench* to take the estate herself, against the opinion of

(a) 1 Salk. 228.

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Chief Justice *Holt*, who thought the executors were trustees for the wife. The opinion of the Court of *King's Bench* in this case seems to have been adopted by Sir *William Grant*, in *Wagstaffe v. Smith* (a). In that case, there was a bequest of stock, in trust, to permit a married woman to receive the interest or dividends to her own use during her life, independent of any husband. And it was held that she was absolutely entitled to the stock for her life. Sir *William Grant*, in deciding that case, observes: "Here are no words of control, no words of restriction. The trustees are not even to pay from time to time into her hands upon her receipt, but she is to receive. Here are the very words to give the absolute property. If land had been given to trustees in these terms, it would be a use executed, and the party would have the legal estate." It is true, the property in that case was stock, and the decision is, therefore, not a direct authority on the subject. In *Jones v. Lord Say and Seale* (b), and *Horton v. Horton* (c), the Court presumed there was an intention to give the trustees the legal estate. And in none of those cases was the remainder to the same effect as the remainder in the present case. If the wife were only tenant for life, it would be proper for the legal estate to remain in the trustees. But the question here is, whether the testatrix's intention would be best effected by giving the legal estate to the trustees, or to her daughter. It is quite clear, that the testatrix's intention was, to give the whole beneficial interest in the property to *Mary Williams*. There is no inconsistency in her giving the whole legal fee to the daughter, and yet restricting the husband from receiving the rents. In *Bennett v. Davis* (d), under a devise to a married woman, in fee, for her separate use, exclusive of her husband, the Court declared the husband to be a trus-

(a) 9 Ves. 524.

(b) 3 Bro. P. C. 113.

(c) 7 T. R. 652.

(d) 2 P. Wms. 316.

tee for the wife, and decreed him to execute a conveyance to a trustee for her separate use. In *Roberts v. Dixwell* (a), the question was, whether, a direction to trustees to convey a freehold estate, in trust for the separate use of a married woman, for her life, and after her decease, in trust for the heirs of her body, was a trust executed or executory. Lord *Hardwicke* held, that it was an executory trust; but observed, if it had been a trust executed, in which case the wife would have been tenant in tail, and the husband entitled to be tenant by the curtesy, the Court, by its authority, might have prevented the husband from intermeddling with the rents and profits during the life of the wife. It was not in the present case necessary, to effectuate the intention of the testatrix, that the trustees should take the legal estate; and the intention of the testatrix can be as well effected by giving the legal estate to the grand-daughter, the Court interposing to prevent the husband from receiving the rents.

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Mr. *Preston*, and Mr. *Duckworth*, for the defendant.—This case does not depend on intention, but on the application of a rule of law, the rule in *Shelley's* case. The object of the rule was to vest the inheritance at the earliest possible period, and to make the heirs take by descent, and not by purchase. To bring a case within this rule, it has been decided, that both the estates must be of the same quality, both legal or both equitable. A legal estate and an equitable estate cannot unite for the purpose of this rule. In the present case, it is attempted to turn one estate into two estates, that is, to give to the trustees a chattel interest during the minority of the grand-daughter, and, on her attaining majority, an estate for the life of the grand-daughter, and to *her use*, so as to be executed by the statute of 27 *Hen. 8*, and

(a) 1 Atk. 607.

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Quære—Whether an order to examine a witness *de bene esse* in a suit merely to perpetuate testimony, and not for relief, can regularly be obtained before answer, or without notice to the other side.

ELLIS v. SINCLAIR.

ON the 28th *November*, an order was obtained, on the application of the defendant, for liberty to examine *Robert Rickett Hunter, de bene esse*, upon interrogatories. The order was obtained without notice, but upon the usual affidavit; and notice was given to the clerk in court, of the time and place of examination of the witness, together with a copy of the interrogatories; and the witness was accordingly examined. A motion was now made to discharge that order with costs, for irregularity, on the grounds that the order had been obtained before the defendant had put in his answer; an answer having in fact been put in by him, to which exceptions had been taken and allowed, and no further answer having been put in before the order was obtained; and also that the order had been obtained without notice.

Mr. *Knight*, and Mr. *Blunt*, in support of the motion, cited *Loveden v. Lord Milford* (a), *Bellamy v. Jones* (b), and *Freer v. Green* (c).

Mr. *Barber*, and Mr. *Macdougall, contra*.—The suit in which the order has been obtained, is merely a bill to perpetuate the testimony of certain witnesses, and does not pray any relief. Two of the plaintiffs are resident abroad. By the practice of this Court, service of the order on the clerk in court is sufficient. Where a witness is examined *de bene esse*, on account of age, the Court always requires the witness to be examined again at the hearing, if living. In *Loveden v. Milford*, the order was improperly obtained, the witness being only sixty-three years of age, instead of seventy, the period required by the rules of the Court. The order there was also obtained *ex parte*, and the

(a) 4 Bro. C. C. 540.

(b) 8 Ves. 31.

(c) 19 Ves. 319.

examination was likewise *ex parte* without notice. In *Bellamy v. Jones*, the order was made on an affidavit, that the witness was advanced in pregnancy and ill of a fever. In *Freer v. Green*, the bill prayed relief. It is quite clear, that, in a case for relief, evidence cannot be entered into before appearance, nor even before answer. In *Casenove v. Vaughan* (a), the deposition of a witness taken in a cause in *Chancery*, in which no answer had been put in, was received in evidence, notice having been given to the other side of the time and place of the examination, and of the interrogatories intended to be put. In *Lee Dicher v. Power* (b), liberty was given to sue out a commission to examine persons who were about to go abroad *de bene esse*, and the defendant to accept four days' notice of the execution of the issuing of the commission.

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Mr. *Knight*, in reply, contended, that this case did not come within the principle of those in which the order might be obtained without notice, and referred to the practice in *Chancery*, as stated in *Newland* (c), that a defendant cannot obtain an order for the purpose before he puts in his answer.

On the 5th *February*, 1829, the LORD CHIEF BARON observed, that on consideration he would not at present make any order in this case, but would reserve his decision until the time appointed for the publication of the depositions, expressing at the same time his opinion, that the doubt thrown on the depositions would probably prevent the parties from attempting to use them, and compel them to procure the attendance of the witnesses.

The motion was directed to stand over until
an application should be made to publish
the depositions.

(a) 1 Maule & S. 4.

(b) 1 Dick. 112.

(c) 1 Vol. 288.

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THOMAS v. JONES.

By the practice of the Court, the plaintiff is at liberty to refer an answer for impertinence at any time before replication. But *semble*, that, for the future this is not to be understood as a general rule.

IN this case, the defendant having filed his answer, and no steps being taken by the plaintiff within the time limited by the rules of the Court, the defendant, on the 23rd *January*, moved for and obtained the usual order to dismiss the plaintiff's bill for want of prosecution, unless cause should be shewn to the contrary on that day week.

On the 26th *January*, the plaintiff obtained, as of course, an order referring the defendant's answer for impertinence.

On the 31st *January*, the defendant gave a notice of motion to discharge that order for irregularity, and an application was made to the Master to suspend proceedings under the reference, until that motion could be made. The motion now came on.

Mr. *Barber*, in support of the order referring the answer for impertinence, contended, that the plaintiff might, at any time before replication, refer the answer for impertinence, as of course; and for this he cited 1 *Fowl. Prac.* 398, and *Gordon v. Davis* (a).

Mr. *Robert Roupell*, *contra*.—The reference for impertinence cannot be obtained after motion to dismiss for want of prosecution. The case in *Fowler* is grounded on *Kinworthy v. Allen* (b); but that being a case in *Chancery* is distinguishable from the present, as there no order to dismiss had been obtained, the reference for impertinence being actually obtained on the same day on which the motion to dismiss was to be made according to notice. The reference is merely for delay. *Goodwin v. Davis* was a reference for scandal as well as im-

(a) 1 Price, 373.

(b) 1 Bro. C. C. 400.

pertinence. Another objection in this case is, that the general order of this Court, with respect to references for impertinence (a), has not been complied with: the order referring the answer was made on the 26th *January*, and no warrant to proceed in it was taken out till the 2nd *February*, and then the defendant applied to the Master to suspend the proceedings.

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Mr. Barber, in reply.—The general order applies only to injunction cases. The proceedings shew that no delay has arisen. It would have been improper for the parties to proceed with the reference after the notice of motion to discharge the order.

LORD CHIEF BARON.—It appears to me to be very fit, that, for the future, it should not be understood as a general rule, that an order of reference for impertinence may be obtained at any time. I had thought it was the practice, that the party should apply before the period arrived, when his bill might be dismissed for want of prosecution. And I think he ought to make the application as soon as possible after he gets the answer. The practice, however, seems to have been, that the plaintiff may obtain the order at any time before he has been driven to the necessity of taking some step by which he is precluded from referring the answer.

I am obliged to follow the practice, but with regret,

(a) By an order of the Court, dated 25th *January*, 1822, it was ordered, that, in all future cases, where orders were made to refer answers for impertinence, the party obtaining the order should obtain the Master's report in four days.

Previously to this order, no time appears to have been limited

by the practice of the Court, within which a party obtaining an order referring an answer for impertinence, was bound to obtain the report. The great inconvenience and injustice of this were manifested in the case of *Joseph v. Simpson*, 10 Price, 25, which was an injunction cause, and gave rise to the general order.

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and must receive the reference as cause shewn against the dismissal of the bill.

The reference allowed, as cause, the plaintiff undertaking to get the report within four days.

GRAY'S INN
HALL,
*Sittings after
Term.*

BEFORE THE LORD CHIEF BARON AND MR. BARON GARROW.

Feb. 23rd.

SNEDE v. CREWDSON.

According to the practice of this Court, an answer filed at any time before the sitting of the Court may be shewn as cause against a motion to extend the common injunction to stay trial.

IN this case, the common injunction having been obtained to stay proceedings at law, Mr. *Knight* now moved to extend it to stay trial.

Mr. *Wright*, for the defendant, stated that the defendant had filed his answer.

On inquiry when the answer was filed, it appeared that it had been filed this morning before the sitting of the Court: on which, Mr. *Knight*, for the plaintiff, insisted that the answer was filed too late to prevent the motion being granted; and in support of this he referred to the rule in *Chancery*, as laid down in *Whitehouse v. Hickman* (a), that an answer, for the purpose of being used as cause against a motion like the present, must be filed at the latest by eight o'clock in the evening before the seal day. He also referred to *Ibbottson* and *Booth* (b). And he contended that, before the answer could regularly be filed, the defendant must clear his contempt.

Mr. *Wright*, *contra*, insisted, that, according to the es-

(a) 1 Sim. & S. 102.

(b) In a note to *Whitehouse v. Hickman*.

established practice of this Court, it was sufficient if the answer were filed at any time before the sitting of the Court. And that in this Court the contempt was considered as cleared, on payment or tender of the costs; which had been done in this cause.

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The officers of the Court represented the practice to be as stated by Mr. *Wright*.

Mr. *Knight*, in reply, observed that, in a majority of the cases in this Court, the common injunction alone stayed trial, except in issuable terms: but the practice was different in the Court of *Chancery*; for if the declaration had been delivered, the common injunction did not stay trial but only execution.

LORD CHIEF BARON.—This is a nice question of practice. The justice of the case is all on the side of Mr. *Wright's* client; for whether the answer was filed on the *Saturday* night, or early this morning, for all purposes connected with the merits, it is the same. The object of the party applying to stay the trial is, that he may have an opportunity to examine the answer. How that opportunity will be better afforded to him by the answer being filed on *Saturday* evening at eight o'clock, instead of this morning, it is difficult to imagine. According to the practice, as stated by the officer of the Court, it is sufficient if the answer be filed before the sitting of the Court. The practice, as far back as can be traced, appears to have been such, and no inconvenience seems to have resulted. If we were driven to adopt the maxim, that there is no fraction of a day, I should in this case think it necessary to consider the answer as having been filed the earliest possible moment of the day. But I think there can be no difficulty in ascertaining the precise time. I am against altering the established practice, unless great inconvenience is shewn to arise from it.

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Mr. Baron GARROW.—This case does not afford any ground for supposing an improper practice to have prevailed in keeping back the answer. And it is clear that, for all useful purposes, the answer is as well filed this morning as late on *Saturday* night. I think no injustice can be done in refusing this application.

Motion refused, but without costs.

Feb. 24th.

MEREDYTH and two Others v. HUGHES and Others.

On the hearing of a cause the bill was dismissed with costs as against the defendants, such costs to be taxed, and, when taxed, to be paid by the plaintiffs. Before the costs were taxed one of the plaintiffs died: the Master proceeded with the taxation, and made his certificate, notwithstanding the surviving plaintiffs objected to the taxation on the ground that the suit was abated. On an application to quash the certificate, the Court held that the proceedings were regular.

BY the decree made on the hearing of this cause, dated 19th *November*, 1827, it was ordered (*inter alia*) that the plaintiffs' bill should be dismissed as against the defendants *John Alexander Willmet, Daniel Hodgson, William Birch, and Steed Laraman*, with costs; and it was referred to *Richard Richards, Esq.*, one of the Masters of the Court, to tax the said defendants their costs; which costs, when taxed, were to be paid by the plaintiffs.

The plaintiff, *Joshua Paul Meredyth*, who was the principal plaintiff, (the two other plaintiffs being his bail at law, and the bill being filed to restrain proceedings at law against the whole of them), died on the 13th *April*, 1828.

The bill of costs of the defendants was not brought into the Master's office until some time after *Meredyth's* decease; and on such bill of costs being left, the surviving plaintiffs contended that the suit was abated by *Meredyth's* death, and objected to the Master's proceeding to tax the costs. Notwithstanding this, the Master, without the attendance of any personal representative of *Meredyth*, proceeded to tax, and by his certificate, dated 17th *December*, 1828, certified such costs to amount to 13*l.* 5*s.* 11*d.*

A motion was now made on the part of the surviving plaintiffs, that the Master's certificate might be taken off the file and quashed.

7 *June* 28th.

Mr. *Simpkinson* in support of the motion.—It is a settled rule, that where a suit is abated, no step can be taken until the suit is revived. Costs in a suit are no debt until they are actually taxed, but are a mere personal demand, dying with the party liable to pay them; and there can be no revivor for costs, unless indeed the costs are directed to be paid out of a particular fund. *Hall v. Smith*(a), *White v. Hayward*(b), *Johnson v. Peck*(c), *Kemp v. Markeel*(d), *Blower v. Morrets*(e). Even where bills are filed merely for discovery, on an answer being put in, it is of course for the defendant to apply for costs: but in that case, it has been held, that the suit cannot be revived for the costs. *Dodson v. Juda*(f), *Gould v. Barnes*(g).

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LORD CHIEF BARON.—In this case there was a decree with costs as against three persons: whether there ought or ought not to have been such a decree I do not feel myself at liberty now to inquire; all I know is, that there is a decree against them jointly for costs. Pending the proceedings, and before the Master's *allocatur* can be obtained, one of the three persons dies; and the argument now is, that the effect of this decree is gone, because one of the parties to the cause is dead. This argument is founded on the general rule, that there can be no revivor for costs only. This seems to me to furnish a good ground for proceeding against the other two; and that the circumstance of no revivor being allowed operates the other way. If it had been possible to bring the personal representatives of *Meredyth* before the Court, there might be some difficulty: for the other defendants, whether considered as

(a) 1 Bro. C. C. 438.

(b) 2 Ves. 461.

(c) Id. 464.

(d) 3 Atk. 812; 2 Ves. 580.

(e) 3 Atk. 772. In addition to these cases see *Morgan v. Scuda-*

more, 2 Ves. jun. 313; *Edghill v. Brown*, 3 Ves. 196; *Lowten v. Mayor of Colchester*, 2 Meriv. 114.

(f) 10 Ves. 31.

(g) 1 Dick. 133.

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principals or sureties, would, in such case, be entitled to a contribution. I think the Master has done right, and that there is no ground for the present application.

Mr. Baron GARROW and Mr. Baron VAUGHAN concurred.

Motion refused with costs (a).

(a) *Walker v. Easterby*, 6 Ves. 333, were cited, on the part of the 612; and *Ex parte Bishop*, 8 Ves. defendants, before the Master.



Same day.

PRINCE v. HAYDIN and TIMMINS.

A bill was filed against two partners, for an account, and an injunction to restrain proceedings at law commenced by them against the plaintiff, and the common injunction was obtained for want of answer. An answer having been put in, exceptions were taken, some of which were allowed. One of the partners, who was resident in *England*, filed a further answer, admitting the facts stated in the bill on which the exceptions were founded; but

THE bill was filed against two partners carrying on business as merchants at *New York*, in relation to a transaction between them and the plaintiff, for an account, and for an injunction to restrain an action at law, brought against the plaintiff by the defendants, for a balance alleged to be due to them. The bill contained charges that the defendants had not duly accounted, and made several objections to the accounts rendered by them.

The common injunction was obtained for want of answer. The defendants having answered, exceptions were taken and allowed, and the bill amended; to which a further answer was put in, and exceptions were taken to the further answer; and, on argument, two of such exceptions were allowed. The two exceptions which were allowed, were founded upon certain inquiries in the bill, with respect to certain bills of exchange.

Timmins, one of the defendants, being in *England*, put the other partner, being abroad, did not put in a further answer. The defendant, who had filed a further answer, moved to dissolve the injunction, on the ground that he had admitted the facts covered by the exceptions, and that, even if his answer did not bind his partner, yet the plaintiff could not obtain from the other defendant more than the same admission of the facts charged by him, which, it was insisted, did not entitle him to an injunction. The Court refused the application, the other defendant not having answered.

in an answer to these exceptions, admitting the facts on which they were founded. But *Haydn* being at *New York*, no further answer was put in by him. *Timmins* having obtained the usual order to dissolve the injunction *nisi*, a motion was now made to dissolve the injunction absolutely.

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13 Bear: 234.

13. Hall Ex- 475

Mr. *Burge* and Mr. *Theobald*, in support of the application to dissolve the injunction, contended that *Haydn's* interest in the debt had been assigned to and vested in *Timmins*; and if it had not, yet, as *Timmins* had admitted the case raised by the plaintiff's exceptions, the plaintiff could not desire more than the same admission from *Haydn*. And if, with the admission by the defendant *Timmins*, the Court thought the injunction ought to be dissolved as to him, it must of necessity do so on the same admission from *Haydn*. In support of the application they cited *Joseph v. Doubleday* (a), and *Kilby v. Stanton* (b).

Mr. *Walker*, for the defendant.—In *Kilby v. Stanton*, the defendant, who had not answered, could never by any proceeding be made to answer. There would have been an absolute failure of justice in that case, as no answer could ever have been obtained. There is no such ground here: but only some inconvenience will arise by the delay of a few months in getting in the answer.

LORD CHIEF BARON.—The only case applicable to the subject, which has been cited, is one which I decided. But that decision proceeded on a very clear ground. There the defendant had distinctly stated that he never would interfere or answer, and that he knew nothing of the circumstances. It was quite clear, that he never would answer; and that, if he

(a) 1 Ves. & B. 497.

(b) 2 Younge & J. 75.

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even were to answer, it would have been a nullity, as he had no knowledge of the subject. I think the merits of this case are with the defendants. I feel satisfied that no answer which can come in will give the plaintiff any more information. This I feel very strongly, but I tremble at letting in such a practice. I feel entirely with the defendant, but if the present application were to be granted, this point would be raised in every case, and would very much increase the labour of a Court of equity with respect to granting injunctions in cases of this description.

Mr. Baron GARROW concurred.

Motion refused.

Jan. 26th.
Feb. 10th.

The Reverend GEORGE WYLD,—Plaintiff;
THOMAS WARD,—Defendant.

The language of an endowment being ambiguous with respect to the tithe of hay, and being unexplained by any subsequent documents, and there being no modern evidence of usage, and no evidence of perception by the vicar, the Court declined to decree for the vicar as against a portionist claiming the tithe in question, but directed an issue.

BILL by the vicar of *Chieveley* in the county of *Berks*, with the chapelries of *Leckhampstead*, *Winterbourne*, and *Oar*, and the tithings of *Courage* and *Snelsmore* annexed, against an occupier of lands within the chapelry of *Leckhampstead*, for an account and satisfaction of small tithes, especially of the tithes of hay, wood, and underwood, had by the defendant since *Michaelmas*, 1818, as also the tithes of corn and grain, peas, beans, vetches, and turnips, or other titheable matters, had by the defendant since the time aforesaid, from off any grubbed lands occupied by him within the said parish which had formerly been wood lands, or covered with hedge-rows, and had since been grubbed, or as had been ancient meadow land, at and before the time of the endowment mentioned in the bill, and had since been broken up or converted into tillage; and also an account of the tithes of hay, corn, and grain, arising from off all orchards, curtilages, and gardens, occu-

pied by the defendant since the period in the bill mentioned, in or within the said parish or the titheable places thereof, and especially in or within the tithing or chapelry of *Leckhampstead*.

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The defendant, by his answer, admitted the plaintiff to be vicar of *Chieveley*, but did not admit the chapelry of *Leckhampstead* to be annexed to the vicarage, and insisted that the plaintiff was not entitled to the tithes of *Leckhampstead*. The defendant admitted his occupation of a farm and lands, situate within *Leckhampstead*, which farm and lands, and also all and singular the tithes arising out of, upon, or in respect of the same, he held and rented of *John Noble, Esq.*, at a rack rent, for a term of years. The defendant also admitted, that he had taken certain quantities of (*inter alia*) hay from off his said lands. And he submitted and insisted, that the plaintiff, as vicar of the parish of *Chieveley*, was not entitled to tithes, great or small, of any titheable matters arising within *Leckhampstead*, or the titheable places thereof, inasmuch as the tithes of *Leckhampstead* were formerly held by the abbot and convent of *Abingdon*, as a portion distinct from the rectory of the said parish, and that the tithes of that part of the lands within *Leckhampstead*, then in the defendant's occupation, did, previous to the letting of the same to the defendant, belong to the said *John Noble*. And that the defendant then held the said lands discharged from all tithes, and was during his tenancy the lawful and rightful proprietor of all the tithes, arising on all the lands occupied by him within *Leckhampstead*.

2 G. & C. 4 - 166

Evidence was entered into on both sides. And the cause was heard on the 1st *May*, 1827; and by the decree it was ordered, that it should be referred to *Richard Richards, Esq.*, one of the Masters of the Court, to take an account of (among other tithes therein mentioned) the tithe of hay had and taken by the defendant from off his farm and lands since *Michaelmas*, 1818, and to take an

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account of the value of all such tithes, with costs to be taxed for the said plaintiff, except certain costs therein mentioned (a).

The plaintiff's claim to the tithe of hay within *Leckhampstead* rested on an endowment in 1314, which endowment, after noticing the appropriation of the church of *Chieveley*, with the chapels to the same church annexed, to the abbot and convent of the monastery of *Abingdon*, and after endowing the vicar (*inter alia*) with the houses of the rectory of the church of *Chieveley*, being at *Winterbourne*, *Danvers*, and *Leckhampstead*, with the areas and crofts to the same adjacent, and giving to the vicar certain commonable rights, contained the following passage:—" *Habebant insuper eadem vicaria omnimodam*
" *decimam fœni de pratis prædictorum religiosorum, ac*
" *quibuscunque locis aliis infra limites ecclesiæ et capel-*
" *larum prædictarum, undecunque provenientem; et si con-*
" *tingat pratum aliquod vel pasturam aliquam, quod vel*
" *quæ ante appropriationem prædictam consuevit esse pra-*
" *tum vel pasturam, redigi in culturam, decimas bladi vel*
" *alterius seminis inde provenientes ad prædictos vicarios*
" *integraliter pertinere.*" The endowment then provided, that the vicar should receive all the small tithes, oblations, mortuaries, and personal payments whatsoever, and the tithes of mills then being and to be erected, and also the tithes of corn of the several places therein mentioned, and the tithes of corn and other seed whatsoever, sown in yards, curtilages, or gardens, and also of flax and hemp wheresoever growing, even if they should happen to be sown in the fields of the said church and chapels, all man-

(a) Though the decree was pronounced on the 1st *May*, 1827, it was not passed or entered until *July* following, some differences having arisen between the parties with respect to the entering of the

evidence as read, and an application being therefore made to vary the minutes. See this case reported on that application, 1 *Younge & Jerv.* 536.

ner of other tithes of corn whatsoever to the monastery of *Abingdon* being wholly reserved.

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The plaintiff at the hearing of the cause proved, by several witnesses, the perception by the vicar of *Chieveley*, for the time being, of the tithes of wool, lamb, pigs, and other small tithes, from certain lands within *Leckhampstead*; and also the receipt by himself, as vicar, of compositions or payments from the occupiers of two farms within *Leckhampstead*, one of them being the defendant's farm, before his occupation thereof, in lieu of the tithes arising therefrom, except the tithe of underwood. But he did not give any evidence of the actual receipt of the tithe of hay, or of any composition expressly for the tithe of hay, of any lands in *Leckhampstead*, either by himself or any preceding vicar of *Chieveley*.

The evidence of the defendant at the hearing was documentary, tending to shew, that the tithes of *Leckhampstead* were held by the abbot and convent of *Abingdon*, as a portion of tithes distinct from the rectory, and, having vested in the crown at the dissolution, had subsequently been granted to persons under whom the present owner of the defendant's lands claimed title. The evidence of the defendant was not limited to the tithe of hay, but went to negative the right of the plaintiff as vicar to any small tithes in *Leckhampstead*.

After the decree, the defendant petitioned for a re-hearing of the cause, so far as respected the tithe of hay, on the ground that it appeared from various documents, stated by him in his petition of re-hearing, that the vicar, though he might be entitled to other tithes, was not entitled to the tithe of hay.

The cause now came on to be re-heard with respect to the tithe of hay.

In support of the re-hearing, the defendant produced the Minister's accounts, from *Michaelmas* 30, to *Michaelmas* 31, *Hen.* 8, accounting for 6*l.* as paid " for the farm

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of the portion of the tithes in *Leckhampstead* in the tenure of *Thomas Cokks* the younger." The particulars for a lease to be granted by the crown of the rectory of *Chieveley*, 15 *Elis.* comprising (*inter alia*) "the farm of all the tithes of corn, sheaves, and grain, and other tithes whatsoever in *Leckhampstead*, late in the tenure of *John Cocks*, of the yearly value of 6*l.*" A grant in fee, 42 *Elis.*, from that queen to *Giles Pocock* and *Richard Pocock* "of the rectory and church of *Chieveley*, and all those the queen's tithes of corn, sheaves, and grain, and other her tithes whatsoever, yearly and from time to time, coming, growing, and arising in *Leckhampstead*, which to the then late monastery of *Abingdon*, then dissolved, did theretofore pertain, and were formerly part of the possessions thereof, and of all and singular messuages, granges, &c., &c." Among other things therein enumerated were, "tithes of sheaves, corn, grain, and hay, wool, flax, hemp, and lambs, and all other tithes whatsoever, as well greater as lesser, and other things therein mentioned, to the aforesaid rectory and church, tithes, and other the premises thereinbefore granted, belonging or appertaining, or as members, parts or parcels of the same rectory and church, tithes and other the premises thereby granted, theretofore had, known, accepted, occupied, used, or reputed." A grant in fee, in the same year, from the *Pococks* to *Richard Hatt* of the same tithes as those comprised in the grant from Queen *Elizabeth*, arising within certain lands in *Leckhampstead*, and (*inter alia*) the farm in the occupation of the defendant. The defendant also produced various leases, grants, conveyances, and other assurances, commencing in the 42 *Elis.*, and continued to the present time, of the tithes of blades, corn, and grain, and all other tithes, arising within certain lands in *Leckhampstead*, the lands comprised in such grants, &c. appearing by various title-deeds and documents deducing the title thereto, (and which the defendant produced), to comprise the farm and

lands in the defendant's occupation: but the tithe of hay, *eo nomine*, did not occur in any of such grants, &c., until the year 1760, when it was, for the first time, expressly mentioned; and afterwards it constantly occurred in the documents.

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The defendant also relied on the want of evidence, on the plaintiff's part, of the perception of tithe-hay in *Leckhampstead*.

Mr. *Jervis*, and Mr. *Tinney*, for the defendant.—The meaning of the endowment is, that the vicar should have the tithe of hay of the lands then in grass, and if the culture of those should be altered, he should be entitled to the tithes of those particular lands; but not that the vicar should be entitled to the tithes of hay generally throughout the parish. The vicar has not shewn any perception of the tithe of hay, whilst the defendant has proved constant enjoyment. In *Oglander v. Pomfret* (a), the endowment appeared to give the vicar the tithe of hay, but the words being doubtful, and the usage contrary, the Court held that the vicar was not entitled. In the Countess of *Dartmouth v. Roberts* (b), a grant before the restraining statutes was presumed against an express endowment of tithe hay, there having been an uninterrupted perception of the tithe in opposition to the endowment. So, in *Manby v. Curtis* (c), it was held, that an express endowment of the vicarage with tithe hay was not sufficient to support a bill for that tithe, without usage, against evidence of a money payment to the rector in lieu of corn and hay. That case is much stronger than the present. *Dorman v. Curry* (d) is also in favour of the defendant.

(a) 4 Wood's Dec. 219; 3 Eagle & Younge (from Lord Chief Baron *Eyre's MSS.*) 1312; S. C. Gwill. 1244.

(b) 16 East, 334; 2 Eagle &

Younge, 655.

(c) 2 Price, 284; 3 Eagle & Younge, 733.

(d) 4 Price, 117; 3 Eagle &

Younge, 825.

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Mr. *Treslove*, and Mr. *Hayter*, for the plaintiff, contended that the endowment gave the vicar the tithe of hay generally throughout the parish, including *Leckhampstead*. They admitted the evidence of perception to be deficient, but urged that the endowment was sufficient evidence of his right, though unsupported by usage. And they cited *Clarkson v. Woodhouse* (a).

Mr. *Jervis*, in reply, urged that the best exposition of ancient deeds was usage. That the evidence of usage was entirely in favour of the defendant, so much so at least, that the Court would not decree in favour of the vicar without an issue.

Feb. 10th.

LORD CHIEF BARON.—This is a partial re-hearing. The bill is filed by the vicar of *Chieveley* for an account and satisfaction of the common vicarial tithes, and it states the plaintiff to be entitled by endowment to all small tithes, including the tithes of hay and wood; and the bill contains a particular charge, that he is entitled to all tithe hay. There is but one defendant, and his lands are situate within a chapelry belonging to the parish, called *Leckhampstead*. The defendant denies the plaintiff's title to the tithes of *Leckhampstead*. He says that the tithes of that district were enjoyed as a distinct portion by the abbot and monastery of *Abingdon*, and that, at the dissolution, they passed into the hands of the crown. He says, he took the lands from one *Noble*, who is now the proprietor of this portion and of the lands, tithe free. And he denies the vicar's right to any tithes in *Leckhampstead*.

Upon the cause coming on, the Court decreed an account of all the tithes prayed, and, as is stated in the petition of re-hearing, particularly the tithe of hay. I have not any note of the judgment, and therefore presume that no important points were discussed at the hearing.

(a) 5 T. R. 412, n.

It is upon the vicar's title to the tithe of hay that the present controversy has arisen. The defendant says, the endowment does not give the vicar the tithe of hay, and that the deeds, under which the landlord holds, give to him the tithe of hay. The question therefore is, whether, on the one hand, as asserted by the plaintiff, the endowment gives the vicar tithe of hay; or whether, on the other hand, as insisted by the defendant, the owner of the defendant's lands is entitled to the tithe.

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I will first consider the operation and effect of the documentary evidence, without reference to the parol testimony. The endowment produced on the part of the vicar shews, that *Leckhampstead* was a chapelry annexed to the parish of *Chieveley*, and, therefore, contradicts the general proposition with which the defendant sets out. That document gives to the vicar various lands, and some rights of common in the woods and pastures of the monastery, and then it expresses hay, "and also all manner of tithe-hay of the meadows of the aforesaid religious men, and in all other places whatsoever within the limits of the church and chapels aforesaid, wheresoever arising." This is a general gift of all tithe-hay from the religious men of their own meadows, which might be necessary on account of the church not paying tithes. The instrument then proceeds:—"and if it shall happen that any meadow or pasture, which, before the appropriation aforesaid, was accustomed to be meadow or pasture, be reduced to tillage, the tithe of corn or other seed thereof issuing to the aforesaid vicar shall wholly pertain." It is very doubtful, from the copy of the document before me, whether the word "*et*" is correct, or whether it should be "*ad*," the latter having originally been copied and afterwards struck out, and "*et*" substituted (*a*). The literal translation as it stands is,—all tithes of hay of the meadows of the aforesaid

(*a*) On examination "*et*" appeared to be correct.

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religious men, and all other places whatsoever, within the limits of the church and chapel. It is certainly inconsistent to add, "and all other places," if only the tithe-hay of the meadows of the religious men was intended to be given. It seems to me to be clear, that the endowment gives the vicar, in terms, all small tithes. So that what appears to be given, is the hay of the meadows then belonging to the monastery, and the grain of the same meadows, if afterwards converted into tillage, and the hay of all other meadows in the parish. There is no other mention of hay in the endowment. There are no other means of construing this instrument than usage, for we cannot at this time tell which were the meadows of the monastery. I have examined all the cases on this subject, and the impression on my mind is, that usage governs the decision in these cases, and that the Court will rather presume a fresh endowment than disturb constant usage. In the endowment there is an express reservation to the monastery of the grange, with the area at *Leckhampstead*, in which the rectors of the church of *Chieveley* had been accustomed to lay up the greater fruits of the chapel of *Leckhampstead*, and which is expressly reserved to them, that they may there lay up the fruits of the chapel. The language used would countenance any usage, and there can be no doubt that the words "greater fruits" would cover hay. The document is so loosely worded, that it will support any construction which usage may put upon it. It is, however, rather more in favour of the vicar, the word appearing to be "*et*" and not "*ad*."

It is next necessary to look at the documents relied on by the defendant.

The Minister's accounts mention a sum of 6*l.*, for the farm of the portion of tithes of *Leckhampstead*. [*His Lordship then adverted to the grants from the Crown to the Pococks, and from the Pococks to Hatt, pointing out several inaccuracies in them, which prevented much reli-*

ance from being placed on them]. It appears that *Hatt* was the owner of a farm in *Leckhampstead*, and I assume that the title is traced down to the present defendant or his landlord, but without any particular notice of hay, till 1780, and now, as it is said, till 1760. Enough appears to satisfy me that there is no objection in law to the tithe of hay belonging to either party. The tithe of sheaves and corn, it is clear, belong to one, and the small tithes to the other. But, as to hay, there is so much obscurity in the documents, that actual possession would decide in favour of either.

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The land in the possession of the defendant seems principally to have been parcel of the possessions of the monastery. Whatever may be the construction of the endowment as to the hay of other lands, it appears at least a probable construction, that, as to their lands within *Leckhampstead*, it was the hay of the meadows alone that was allotted to the vicar. As it is not explained by any document, the usage alone can ascertain what lands these were, or decide whether, upon the true construction of the endowment, it carried hay whenever raised upon their lands.

Both sides have left this question entirely without evidence. The defendant has examined no witnesses. He abandons entirely all proof respecting the modern usage. His situation, in this respect is somewhat difficult. Where the owner of the land is also the portionist of the tithes, his possession is a mere retainer, and will not avail him unless he can shew an occasional severance, such as making a lease of the land, reserving the tithe, and actually taking them.

The vicar is not under the same difficulties, yet, in this case, he is equally bare of material evidence. I have looked into the evidence, and must say, I never saw any testimony so imperfect. There are four witnesses, one of them, *Joseph Wedel*, says, that a composition was paid for all the tithes of the farm, and makes no exception. He

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must speak therefore inaccurately, because the composition could not be paid for the tithes of grain. One would think that his mind was impressed with the notion that the vicar was not, as originally contended by the defendant, entitled to any tithes, a notion certainly inconsistent with the fact. No reliance can be placed on such a deposition, though express, being given *alio intuitu*: two others say, that the composition was paid for the tithes due to the vicar, not specifying what those tithes were, which is the very point in dispute. A fourth witness specifies a time when the vicar took the tithes in kind, and mentions that he took lamb, wool, and other small tithes, but does not mention hay. This is against the vicar, for if the vicar had taken hay, why does he not mention it. So that in fact there is no parol testimony on which any reliance can be put on either side. The documents therefore failing to afford a clear line, both the parties being placed in a situation which leads each of them to make out his case, the one being a portioner, and the other a vicar, and the modern testimony of usage proving nothing, I see no way of advancing towards the settlement of the dispute except by directing an issue. In the issue let the vicar be the plaintiff, who may, if he thinks fit, abandon it.

The doubt in my mind as to directing an issue, has principally arisen from the manner in which the defendant has made his defence; insisting that the plaintiff had no title to any tithes in *Leckhampstead*, rather than denying his title to the tithe of hay of his own farm. But as there is a fair ground to question the right to the tithe of hay, and any course I might take other than an issue would lead to another bill, it seems therefore better that an issue should go at once.

END OF HILARY TERM AND SITTINGS AFTER.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Exchequer,

IN

EASTER TERM, 10 GEO. IV. AND THE SITTINGS AFTER.

EXCHEQUER OF PLEAS.

NORMAN *v.* DANGER and Another.

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TRESPASS on the case. At the trial of this cause, in the year 1825, the plaintiff was nonsuited, and in *Hilary* Term, 1829, *Gaselee, J.*, before whom the cause was tried, granted his certificate to entitle the defendants to double costs, under the statute 7 *Jac.* 1, c. 5 (a), upon reading an affidavit made by the defendants, which stated, that they were churchwardens, and that the action was brought in respect of an act done by them, by virtue of their office. In this Term, a rule was obtained to set aside that certificate, against which

A certificate, that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under the stat. 7 *Jac.* 1, c. 5, need not be granted immediately after the trial of the cause.

Where the plaintiff is nonsuited, the Judge before whom the cause was tried, may, after an interval of four years,

Bayley, R., shewed cause.—Unless it be in the discre-

upon an affidavit that the defendant was within the provisions of the stat. 7 *Jac.* 1, c. 5, grant a certificate to entitle him to double costs.

(a) Extended to Churchwardens by stat. 21 *Jac.* 1, c. 12, s. 3.

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tion of the Judge to act upon affidavits, defendants would in many cases be deprived of the benefit of the statute; for, as the form of the declaration is under the control of the plaintiff, the character of the defendants never appears upon the record, and, where the plaintiff is nonsuited, they may have no opportunity of proving it by evidence. Where a plaintiff discontinues, the Court will, upon an affidavit stating that the act for which the defendant was sued, was done by virtue of his office, direct the Master to tax double costs; and upon the same principle the Judge who tries the cause may resort to the same means of ascertaining the character of the parties. By the words of the statute, the Judge who tries the cause, is the sole judge of the propriety of the certificate (a), *Grindley v. Holloway* (b), which may be granted either at or after the trial. *Harper v. Carr* (c).

Chilton, contra.—The words of the statute, and the cases which have been cited to establish, that the allowance of double costs rests with the Judge who tries the cause, furnish a strong argument that he must act upon what appears at the trial, and not upon extraneous matter; for if the question were to be decided upon affidavits, the Court from whence the record proceeded, would be the proper tribunal before which that question should be discussed. The difficulty suggested as arising from a nonsuit, before the defendant has had an opportunity of proving the character in which he acted, might be obviated by intimating the fact to the Judge who presides at *Nisi Prius*, and proving it by oral testimony.

HULLOCK, B.—There are two questions in this case: the *first*, whether the certificate has been granted in due time; and the *second*, whether the application ought not,

(a) *Anon.* 2 Vent. 45.

(b) *Dougl.* 307.

(c) 7 T. R. 448.

under the circumstances, to have been made to the Court. The words of the statute are, that if the verdict shall pass with the defendant, or the plaintiff therein become nonsuit, or suffer any discontinuance thereof, in every such case the Justice or Justices, or such other Judge before whom the said matter shall be tried, shall allow unto the defendant double costs. If it had said, that he shall do so in open Court, at the trial, as some statutes do, then, it is evident, that the allowance could only be made immediately after the trial. It does not, however, so enact, but leaves it open; and the construction of statutes *in pari materia* has latterly been, that in such cases the Judge may grant his certificate within a convenient time. That was distinctly laid down, upon the construction of this very statute, in the case of *Harper v. Carr*, to which allusion has been made (a). If then the certificate need not be granted at the trial, it will be for the Judge, in the exercise of his discretion, to determine whether the application be made with sufficient promptitude, or the delay be properly accounted for; and we must assume, that, in granting this certificate, the learned Judge took all these circumstances into consideration. But it is said, inasmuch as the facts were not developed before the Judge who presided at *Nisi Prius*, that the application should have been made to the Court. If the words of the statute had been, that the matter should appear at the trial, the Judge could have no jurisdiction unless it did so appear; but there are two cases mentioned in the act, nonsuit and discontinuance, in which it would be impossible to certify at *Nisi Prius*. In the latter case, the Courts have taken upon themselves to allow costs, because, if only a Judge at *Nisi Prius* could certify, the provisions of the statute would be rendered nugatory in all cases of discontinuance. So, where the

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(a) According to 1 Crompt. Pract. 278, the certificate must be obtained at the trial.

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plaintiff is nonsuited, unless the course which has been pursued in this case could be adopted, double costs could not be allowed, for I never knew a Judge inquire into the circumstances of the case, after a plaintiff had been nonsuited. Cases have occurred, in which the Courts have allowed costs upon affidavits. Thus, in *Walker v. Eger-ton* (a), which was an action against the collector of the land-tax, the plaintiff was nonsuited, and the defendant afterwards moved the Court for treble costs, upon an affidavit that he was sued for something done as collector; and the Court directed a suggestion to be entered upon the roll. So, in *Cathero v. Cooper* (b), the Court permitted a similar suggestion to be entered on the roll, to entitle the defendants, who were commissioners under the *Kensington* turnpike act, 12 Geo. 1, c. lxxxvii, to treble costs, against the plaintiff who was nonsuited; and in *Barton v. Miles* (c), where the plaintiff was nonsuited, the Court granted a rule for the like purpose, to entitle the defendants to double costs, upon an affidavit that they were collectors of the tax for window-lights, and were acting in the execution of their office. The statutes upon which these applications were granted, directed generally that the defendants should recover, and not, as in this case, that the allowance of double costs should be made by the Judge before whom the matter should be tried; but I cite them merely for the purpose of shewing that the applications were entertained upon affidavits. By the express words of this statute, the Judge who tries the cause, must certify that the defendant acted by virtue of his office, or make him an allowance of double costs upon the record; and, as it is not necessary, that that should be done at the trial, I am of opinion, that this certificate has been properly allowed. Within my own experience at the bar, two learn-

(a) Comb. 322.

(b) 2 Barnard. 103, 117.

(c) B. R. H. 125.

ed Judges granted certificates, under similar circumstances, upon this statute.

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The other Barons concurred, and the rule was

Discharged.

PHILLIPS, Administratrix, v. WILLIAMS.

THIS was an action upon *concessit solvere*, to which, amongst others, there was a plea of payment, and an issue thereon.

The action by *concessit solvere* in *Wales*, cannot be commenced by notice, but only by original.

Where an attorney in *Wales* delivered a notice, that an action had been commenced, to a bailiff, to be served upon the defendant, who afterwards, and before the notice was served, paid the plaintiff his debt; and the attorney afterwards proceeded by *concessit solvere*, to recover the costs:—
Held, that the notice did not operate as the legal commencement of the action, and

At the trial, before *Goulbourn, J.*, at the Great Sessions for *Pembrokeshire*, the only question was, whether the payment was made before or after the action was commenced. The evidence upon this point was, that on the 4th *August*, 1828, the attorney for the plaintiff filled up one of the usual printed forms of notice of action upon *concessit solvere* (a), and delivered it to a bailiff to serve upon the defendant; and that the payment was made after the delivery of the notice to the bailiff, but before the notice was served upon the defendant. Upon this evidence, it was contended that the filling up and delivery of the notice to the bailiff was a commencement of the action, and that a subsequent payment was too late; but the learned Judge was of a different opinion, and the plaintiff was nonsuited.

that the payment was in time.

(a) The following is a copy of the notice:—

“To Mr. C. D. (the defendant)
This is to give you notice that an action is commenced and will be prosecuted against you at the next Great Sessions, to be holden, &c., by A. B. for the sum of £—, due

from you to him, for &c., and that the said plaintiff will proceed to trial at the said next Great Sessions, to which said action you may appear and make your defence if you think proper. Dated, &c. Your's &c.”

2 l & q. J. J.

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A rule having been obtained, calling upon the defendant to shew cause, why that nonsuit should not be set aside and a new trial had,—

Evans, J., and *Wedge-wood*, now shewed cause.—It is difficult to conceive how a notice of action, which is a mere private transaction, can be the commencement of a suit. There is no analogy between this and the proceeding by *ca-pias* in the Court of *Common Pleas*; for in the Great Sessions, an original is always issued as the process by which the action is commenced before the notice is served, and the terms of the notice itself so import. In *Foley's Prac-tice* (a), the proceeding upon *concessit solvere* is treated of, and the forms of the *præcipe* and original writ are given as necessary steps before the service of the notice; and in *Russell's Practice* (b), it is said to be usual to sue out an original where it is intended to proceed by *concessit sol-vere*. The notice itself is but the creature of the Court, and is given in pursuance of a rule of Court (c), for the purpose of accelerating the trial: it may be served before any writ has been sued out, but in that case must state that an action will be commenced (d); which clearly shews that the notice itself is not the commencement of the suit. At all events, to lay the foundation of an argument, the notice must be served.

(a) Page 12.

(b) Page 12.

(c) "For preventing delays in all personal actions hereafter to be commenced in this Court, it is ordered, that the defendant being served fifteen days before Sessions, (which service must be exclusive of the day of service and the day of Sessions), with notice in writing under the hand of the plaintiff's attorney, expressing the cause of action, and the sum demanded, and

affidavit made of the service of such notice and filing a declaration before the sitting of the morning Court the second day of the same Sessions, the plaintiff shall be at liberty to proceed to trial or judgment the same Sessions. And in case the defendant appears, and shall not plead the next Court, a rule being given for that purpose, the plaintiff shall have judgment in such action by *nil dicit*."

(d) Russ. Pract. 53.

Williams, E. V., in support of the rule.—In theory, the original writ is the commencement of the action, and, as in the case of a *capias*, ought regularly to be sued out in the first instance; but in practice it is not issued until after the action has been proceeded with; and the notice is considered to be, as it in terms expresses, the commencement of the suit. This is clearly proved by the rule of Court, (Autumn Great Sessions, 1816 (a),) for unless, when served, the notice operated as a commencement of the suit, no costs could properly be incurred, and the plaintiff could have no claim upon the defendant. The action by *concessit solvere*, conducted in this mode, is a domestic action, to which the non-intervention of a public functionary is incident; it is a form of action cheap and summary, and therefore highly beneficial, which it would be most dangerous to disturb. Assuming that the notice, when served, is the commencement of the action, it remains to shew, that service is unnecessary. Now the term “served,” in the rule of Court, 1816, refers to the amount of costs, and not to the validity of the notice as the commencement of the suit. At the same Session, a similar rule was made with reference to a *capias*; and if, in the construction of the one rule, it be held that service of the notice is necessary, it must follow, that in every case the *capias* must be served, to operate as the commencement of the suit. Yet it could not be contended, that, to a plea of tender, the replication of a *capias*, antecedently sued out, must aver that the *capias* was served; and by a parity of reasoning, such an averment would be un-

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(a) “Ordered that, from the present Great Sessions, in all actions of *concessit solvere*, if the defendant, being served with notice of suit, shall, before the first day of the Sessions, offer or tender to the plaintiff or his attorney, the amount of

the debt sued for, with one pound one shilling for the costs of suit, if the plaintiff or his attorney shall refuse or decline to accept the same, all subsequent proceedings had in such suit shall be at the peril of the plaintiff or his attorney.”

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necessary in the case of a notice. Whether the notice be or be not served, it is open to precisely the same objections; and therefore it follows, that if, when served, the notice would be a commencement of the action, the suit will equally be commenced though the notice be not served.

GARROW, B.—I am of opinion, that this notice was not the legal commencement of the action, and that the payment was in time. The object of the notice is merely to apprise the defendant that an action has, by some other means, been instituted against him, and to inform him of the steps which he must take, in order to defend himself against it. So the rule of Court, upon which reliance has been placed, does not say even that the service of the notice shall alone be sufficient, but, in aid of the defendant, ascertains the amount of costs to which he shall be liable up to a certain stage of the proceedings, and by the payment of which the action may be terminated. From a different construction serious injustice might ensue. It might happen, that an attorney who meets his various clients at a place of general resort, might ascertain the nature of their demands against various individuals, and, upon his return home, fill up a variety of notices, which might lie dormant, until the parties had amicably arranged their differences, and then they might involuntarily be involved in expensive litigation, merely to put fees into the pocket of the attorney.

HULLOCK, B.—After the best consideration which I can give this case, I am of opinion, that the rule should be discharged. The simple question is, whether this notice, which, upon the face of it, imports that an action has been commenced, is the legal commencement of an action, and we are not now called upon to put a construction upon the rule of the Autumn Great Sessions, 1816. Now it appears to me, that the object of this notice is similar to that

of the service of a *latitat* or *capias*, viz. to bring the party into Court; and no one could contend that a mere notice originating in the attorney's office, without more, would, in those cases, be sufficient for that purpose. Could a notice of this description be replied to a plea of the statute of limitations?—Certainly not; the replication would state the issuing of the original, and that would be the document which would be put in issue. It cannot, gravely, be contended, that there is any analogy between this notice and the commencement of a suit by *capias*. To render it available, it must be averred, that the *capias* was issued with a view to the particular suit, and where continuances are necessary, it must be shewn that the first writ was returned. The point would neatly arise upon the replication to a plea of tender, but that may be said to involve the same question. Upon the whole, I am of opinion that this notice is like the service of a copy of a *latitat* or *capias*, and merely intended to intimate, as the notice itself expresses, that an action has previously been commenced, and not that the notice is the commencement of the action. We cannot advert to any inconvenience which may arise from this decision; our duty simply is, to decide whether this notice be or be not the legal commencement of the suit.

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VAUGHAN, B.—Judging from the terms of the notice, and by analogy to the proceedings in the superior Courts, I should have supposed that the original had been issued; and by the report of the law commissioners that writ seems to be the foundation of all proceedings upon *concessit solvere* in the Principality, for a charge for the original is uniformly made. It may be that, in practice, the original is not issued in the first instance; but, when called upon, we must correct a practice which is certainly illegal. The argument of my learned brother upon the effect of this notice, with reference to a plea of the statute of limitations, is, to my mind, conclusive; for it

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would be a mere mockery of pleading to put upon the records of the Court, in answer to such a plea, that, six years before, a notice like the present had been filled up by the attorney, and delivered to a bailiff to be served.

Rule discharged with costs.

COLEMAN v. WALLER.

A creditor, in respect of two demands, seized the goods of *B.*, his debtor, under an execution for one of the two debts, and afterwards, at a meeting of some of the creditors of *B.*, when a composition was proposed, declared that he would not agree to the composition, unless the debt for which the goods had been seized, were secured to him; *C.*, who was not a creditor, guaranteed the debt, and *A.* withdrew his execution, and signed the composition deed:—*Held*, that the bargain was a fraud upon the rest of the creditors, and void.

ASSUMPSIT upon a guarantee. The declaration stated, that, on the 16th *December*, 1824, *Dent* and *Mannett* were indebted to the plaintiff in the sum of 600*l.*, for money lent, and of 340*l.*, for goods sold and delivered; and that, by a certain agreement in writing, made and signed by the plaintiff and the defendant, (reciting that *Dent* and *Mannett* were so indebted, and that the plaintiff having a warrant of attorney for the 600*l.*, had on or about the 8th of *December*, entered up judgment and sued out execution thereon, by virtue whereof the Sheriff had seized and was in possession of the stock and effects of *Dent* and *Mannett*; and that they had proposed a composition to their creditors, for which purpose, they, and divers of their creditors, were desirous of having the plaintiff's execution withdrawn forthwith; which the plaintiff had agreed to do upon being indemnified, and upon payment of the costs of the judgment and execution, and the Sheriff's fees; which guarantee the defendant agreed to give), it was witnessed, that, in consideration of the plaintiff so agreeing (which he did thereby) to withdraw his execution upon payment of the said costs, and Sheriff's fees, &c., the defendant did thereby guarantee and agree to indemnify the plaintiff from all loss or deficiency that he might sustain or be put to, in respect of the 600*l.*, by the agreeing to the composition, or by any commission of bankruptcy that might be sued out on default of the com-

position being carried through, or in any other manner, by his so withdrawing his execution, so that the plaintiff might receive the full amount of twenty shillings in the pound, on his debt of 600*l.*; and averred, that the plaintiff agreed to the composition, and withdrew his execution, and that a commission of bankruptcy was sued out against *Dent* and *Mannett*, by means of which and the plaintiff's agreeing to the composition and withdrawing his execution, the plaintiff had sustained a loss of 250*l.*, which the defendant had not paid. Plea—*non assumpsit*.

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At the trial, before the Lord Chief Baron, at the *London* Sitings, the following appeared to be the facts of the case:—*Dent* and *Mannett*, who carried on business at *Southampton*, were, in *August*, 1821, indebted to the plaintiff, to the amount of 300*l.* for goods. He afterwards lent them 600*l.*, at first without security, but on the 19th *November*, 1824, without solicitation, they gave him a warrant of attorney for the 600*l.*, upon which, on the 8th *December*, judgment was entered up, and, on the same night, the execution was sent down. On the 10th, at which time the Sheriff was in possession under the execution, a meeting of the creditors was had, but was attended by twenty-five only out of seventy-five individuals, to whom *Dent* and *Mannett* were indebted. *Dent* and *Mannett* were considerable debtors to one *Davidson*, of whom the defendant was then a clerk; but had since become the partner. *Dent* and *Mannett* were anxious to prevent a bankruptcy, and with that view a composition was proposed. It was openly declared by the plaintiff, or rather in his behalf, that he would not come in for his money debt of 600*l.*, nor sign the composition deed, nor withdraw his execution, without security for that debt. The defendant, who, on *Davidson's* account, was desirous that the execution should be withdrawn, offered to give that security; upon which the guarantee was prepared and signed by the defendant, and the plaintiff withdrew his execution, and afterwards

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signed the composition deed, by which 16s. in the pound were to be paid, and to be secured by promissory notes. The deed contained a release to *Dent* and *Mannett*, in the usual terms. The plaintiff put his signature to this instrument, some time between the 8th and 10th of *February*, 1825; and upon view of the deed, there appeared to be a good many signatures before, and about thirty-five after that of the plaintiff. Some obscurity prevailed in the evidence, as to the order in which these signatures were subscribed; and there was reason to suppose that, before the signatures were put, the places for them had been marked in pencil, so that no certain inference as to the priority of the signatures could be drawn from their juxtaposition. It was clear, however, that there were many signatures after that of the plaintiff, and one witness, whose name appeared after his, deposed, that, to his belief, the previous signatures were written at the time he signed. *Dent* and *Mannett* were bankrupts in *July*, 1825.

The Lord Chief Baron directed the Jury to consider whether the warrant of attorney given to the plaintiff was a fraudulent preference; and upon their finding that it was not, the plaintiff had a verdict for 223*l.* 15*s.*

In pursuance of leave granted for that purpose, *Campbell*, in *Michaelmas* Term, obtained a rule *nisi*, to enter a nonsuit, or for a new trial, against which—

Pollock, F., and *Alderson*, shewed cause.—At the trial, the only question was, whether the warrant of attorney amounted to a fraudulent preference. Upon that question the Jury have decided, and their finding cannot now be impeached. But it is said, that the guarantee was a fraud upon the other creditors, and is therefore unavailable. To this the answer is twofold: *first*, that there was no fraud, the creditors having been sufficiently apprized of the trans-

action; and *secondly*, that this does not fall within that class of securities which are considered to be fraudulent. This transaction can only be looked at upon the principles of good faith; and the plaintiff having by his declaration at the meeting done every thing that was fair and reasonable, it was the duty of the defendant to apprise the creditors of what there passed, or, if they made no inquiry, they were bound by what there transpired. In *Cockshott v. Bennett* (a), the transaction was unknown to the creditors, there was an attempt at concealment, and the money was to be paid out of the insolvent's estate. The principle of that case cannot therefore apply to this, for the determination of the plaintiff was publicly declared, and the guarantee is from a third party, the original debtors being absolutely released. The debtors are not liable over upon the guarantee, for there is no evidence that it was given at their request or for their benefit. But this security is not within that class which are considered to be fraudulent. The principle applies to cases in which the party stipulates for a benefit beyond that which the other creditors have, who sign the deed, but not to securities existing before the negotiation for a composition. Here the plaintiff stipulated for no benefit *ultra* the other creditors. The finding of the Jury establishes that he had a valid security, and was therefore in a condition to satisfy his claim in respect of the money lent. He merely accepted the guarantee of the defendant, in lieu of the goods, which, if not relinquished, would, notwithstanding the composition, have been available to the plaintiff. *Thomas v. Courtney* (b). This circumstance distinguishes this from the cases of *Smith v. Bromley* (c), *Cecil v. Plaistow* (d), *Cockshott v. Bennett*, *Jackson v. Lomas* (e), *Feise v. Randall* (f), *Jack-*

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(a) 2 T. R. 763.

(b) 1 B. & A. 1.

(c) Dougl. 695.

(d) 1 Anstr. 202.

(e) 4 T. R. 166.

(f) 6 T. R. 146.

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son v. Mitchell (a), *Leicester v. Rose* (b), *Wells v. Gir-ling* (c), and *Jackson v. Davidson* (d), which relate to new securities given as a consideration for signing the composition deed, or certificate; and proceed upon the ground that the advantage gained by the particular creditor is a fraud upon the others; but do not apply to securities existing before the negotiation for a composition (e).

Campbell, and Richards, R. V., contra.—The principle of the case of *Cockshott v. Bennett*, and that class of cases, is, that for the preservation of good faith, no private agreement in fraud of the other creditors shall be available in law. Now, this is a private agreement in fraud of the creditors, for, although some were present at the meeting, many who signed the composition deed after the plaintiff, must be assumed to have signed upon the understanding that he assented to the composition in respect of his whole demand. It is also a principle of that class of cases, that the estate of the insolvent shall be discharged; and it may be laid down as a general rule, that, wherever an insolvent is liable upon an agreement beyond the composition, that agreement will be void. In accordance with this principle, the case of *Thomas v. Courtney* was decided; for, in that case, there was no remedy over against the insolvent *ultra* the composition. Now there is nothing to distinguish this from the case of an ordinary guarantee. The defendant is no party to the composition deed; and as the law implies a promise upon the part of the original debtor to reimburse the surety, *Dent* and *Mannett* would be without defence to an action at his suit. But considering that the defendant has no remedy over against the original debtors, still the agreement is fraudulent and void. By entering into the composition, and, at the same time, accepting a

(a) 13 Ves. 581.

(b) 4 East, 372.

(c) 1 B. & B. 447.

(d) 4 B. & A. 691.

(e) 4 B. & C. 516, note to *Lewis v. Jones*.

collateral security even for the same amount, the party misleads the other creditors into a situation in which his own act shews he thought it unreasonable that they should be placed; and there can be no doubt, that if a creditor, who signs a composition deed, or agreement, and thereby induces other creditors to sign it, makes any private bargain, the effect of which is to place himself in a better situation than the other creditors, he thereby commits a fraud upon them, and that such private bargain is void. *Sadler v. Jackson* (a), *Lewis v. Jones* (b), *Rogers v. Kingston* (c), *Briant v. Christie* (d). They argued also that the verdict was contrary to the evidence, and that the warrant of attorney amounted to a fraudulent preference.

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The Court took time to consider, and now

The LORD CHIEF BARON, after stating the pleadings and facts of the case, delivered the judgment of the Court as follows:—The Court is of opinion, that, in this case, a nonsuit should be entered. The principle upon which the Court are of this opinion, is the same as decided the case of *Cockshott v. Bennett*, followed by many other decisions. This security was given to induce the plaintiff to sign a composition deed, by which he held himself out to the other creditors, as accepting 16s. in the pound, and thereupon discharging the debtors. He did in effect sign the deed, agree to accept this diminished sum, and discharge the debtor. As the case, notwithstanding some circumstance favourable to the plaintiff, comes, in the opinion of the Court, directly within the principle of that class of authorities to which I have alluded, we think there must be a nonsuit, and that the rule must be made

Absolute (e).

(a) 15 Ves. 52.

(b) 4 B. & C. 506.

(c) 2 Bingh. 441.

(d) 1 Stark. N. P. 329.

(e) See *Murray v. Reeves*, 8 B. & C. 421.

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GRIFFITH and Others v. HUMPHREYS.

No person can deliver a declaration by the bye in the Court of *Exchequer*, except the original plaintiff.

PROCESS having been issued against the defendant, and an appearance entered at the suit of another plaintiff, declarations, in this and eighteen other actions, were delivered against the defendant by the bye, and judgments signed. A rule was afterwards obtained to set aside these judgments, upon the ground that the appearance, in the first action, had been fraudulently entered, and that the declarations by the bye were not, under the circumstances, warranted by the practice of the Court. Upon shewing cause, all matters were referred to the Master, who found that upon the appearance having been entered for the defendant in the original action, the plaintiffs, during the same term, delivered a declaration by the bye, without any process having been issued, or fresh appearance entered or recorded for the defendant; that the defendant had obtained an order to *imparle* after the order for time to plead, and had subsequently, by his clerk in court, signed a *cognovit* confessing the action; he further found, that such proceeding, by delivering a declaration by the bye at the suit of a different plaintiff, was not warranted by any known or acknowledged rule or practice of the Court, and awarded that the parties should each pay their own costs.

Richards, moved to set aside this award, contending that the subsequent steps taken by the plaintiff were a waiver of the irregularity; but

The Court being of opinion that the practice was correctly stated by the Master, and that the plaintiffs were estopped by the award, refused the rule.

Rule refused (a).

(a) By the old rules of Court it is ordered, "that upon every defendant's appearance, the plaintiff may put in as many declarations as

he will against every such defendant, provided they all be put in at one and the same time." 1 Burton, Pract. 149. The difference in the practice of the Courts of *King's Bench*, *Common Pleas*, and *Exche-*

quer, in this respect, proceeds upon the supposition, that in the former the defendant is in the custody of the Court when he files common bail. Cro. Jac. 605.

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EXCHEQUER CHAMBER.

(*In Error from the Court of Exchequer*).

COR. LORD TENTERDEN, C. J., AND BEST, C. J.

ADAMS v. MEREDREW.

LIBEL. The declaration, after a prefatory averment that the plaintiff was a justice of the peace, stated that the defendant published of and concerning him, and of and relating to him as such justice of the peace, the following libel:—"The other magistrates residing within our county are *H. C. Adams*, Esq. and *F. G.*, Esq., the latter of whom is gone abroad: as to Mr. *Adams*, he is chairman of the finance committee of the county of *W.*, and has audited accounts containing items of upwards of 12,000*l.* for the nominal purpose of furnishing lodgings, plate, &c. for the Judges; but which expenditure, in reality, was to find accommodation for the magistrates, as the Sheriff always found the Judges suitable lodgings, without putting the magistrates to any expense;" which was explained to impute, in one count, that the plaintiff had conducted himself corruptly, unduly, and improperly, in his office of justice of the peace; and in the second, that, in his office of justice of the peace, he had behaved and conducted himself in an improper manner, and contrary to his duty as such justice and chairman as aforesaid. The Jury found a verdict for the plaintiff; and the Court arrested

It is actionable, without the aid of prefatory averment in the declaration, to write of a magistrate, that, "as chairman of a finance committee, he audited accounts containing items of upwards of 12,000*l.* for the nominal purpose of furnishing lodgings, plate, &c. for the Judges; but which expenditure was in reality to find accommodation for the magistrates, as the Sheriff always found the Judges suitable lodgings, without putting the county to any expense."

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the judgment, upon the ground that the publication was not libellous *per se*, and was not explained by apt averments in the declaration, so as to convert that which was apparently innocent into a libel (a). A writ of error having been brought, the case was argued by *Hill* for the plaintiff in error; and *Chitty*, for the defendant in error, who recapitulated the topics which were urged upon the former occasion.

The Court took time to consider. And now Lord TENTERDEN advised the Lord Chancellor to reverse the judgment, observing that the Lord Chief Justice of the *Common Pleas* and himself were of opinion that the words of the libel conveyed a meaning different from that which had been attributed to them by the Court of *Exchequer*.

Judgment reversed (b).

(a) *Ante*, Vol. 2, p. 417.

(b) A writ of error is now pending in the House of Lords.

(*In Error from the Court of King's Bench*).

LLOYD and Others v. SIGOURNEY.

A bill of exchange, payable to order, was indorsed by the payee to *A.*, who indorsed it as follows: "pay to *B.* or his order for my use,"

B. applied to his

bankers to discount the bill, and they *bond fide*, but not without making inquiry, did so:—*Held*, that the indorsement was restrictive; that *B.* was a trustee for *A.*, and could confer no greater interest to his indorsee, against whom *A.* was entitled to recover.

ASSUMPSIT for money had and received. Plea—*Non assumpsit*. At the trial, the Jury found a verdict for the defendant in error, (the plaintiff below), subject to the opinion of the Court of *King's Bench* upon a special case, which was afterwards, upon the judgment of the Court in

favour of the defendant in error, turned into the following special verdict. *Exch. Chamber, 1829.*

In the month of *July*, 1825, *Amasiah Attwood*, who commanded a vessel belonging to the defendant in error, took, in payment of a cargo of flour, the property of the defendant in error, which he sold at *Rio Janeiro*, a bill of exchange for 3,164*l.* 11*s.* 8*d.*, drawn in a set of three, by *March, Sealy, Walker, & Co.*, of that place, on *March, Sealy, & Co.* of *London*, which bill was payable to the order of Messrs. *Hendricks, Weirss, & Co.*, who indorsed it to *Attwood*. The following is a copy of the third part of the said bill:—

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1648. 11s. 8d.

“ *Rio de Janeiro*, the 12th *July*, 1825.

For 3164*l.* 11*s.* 8*d.*

“ At sixty days’ sight, pay this third of exchange, (first and second not paid), to the order of Messrs. *Hendricks, Weirss, & Co.*, three thousand one hundred and sixty-four pounds, eleven shillings, and eight pence, value of the same, which place to account, as *per* advice from

March, Sealy, Walker, & Co.”

This bill was indorsed by the payees to *Attwood* or order, by him to the defendant in error, by the defendant in error in the following terms:

“ Pay to *Samuel Williams*, Esqr. of *London*, or his order, for my use;” and by *Williams* to the plaintiffs in error.

Attwood sent the first of the set to the correspondent of the defendant in error, Mr. *Samuel Williams*, of *London*, who was an *American* agent and factor for merchants and planters, carrying on such business to a very great extent, inclosed in the following letter:—

“ Sir,—I herewith have the honor to enclose you the first

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of exchange for 3,164*l.* 11*s.* 8*d.* sterling, at sixty days' sight, on Messrs. *March, Sealy, & Co.*, in *London*, in favor of myself, it being the proceeds of a cargo of flour, in Brig *Swiftsure*, belonging to *Henry Sigourney, Esqr., Boston, America*, which you will please to present for acceptance, and keep at the disposal of the second or third."

Attwood did not indorse the first of the set. *Williams* received the letter and bill, on the 26th *September, 1825*, and procured the acceptance of the bill in due course. The third of the set was remitted to the defendant in error, and he having indorsed it as aforesaid: "Pay to *Samuel Williams, Esqr. of London*, or his order, for my use," remitted it to *Williams* in the following letter of the 17th *September, 1825*.

"Sir,—Captain *Amaxiah Attwood*, of my brig *Swiftsure*, arrived here yesterday, from *Rio de Janeiro*, whence he sailed about the middle of *July*; he informed me, that he left a letter directed to you to be forwarded by the next English mail, containing the first of *March, Sealy, Walker, & Co.*'s draft on *March, Sealy, & Co., London*, dated *July 12th*, at sixty days' sight, for 3,164*l.* 11*s.* 8*d.* sterling, in favour of Messrs. *Hendricks, Weirss & Co.*, and by them indorsed to the said *Amaxiah Attwood*; he thinks he did not indorse the draft, and, if received, it can only be accepted. Enclosed you have third bill of the set indorsed to me by Captain *Attwood*, and to yourself by me. I presume that if the other should have been previously received and accepted, that a receipt on the one now transmitted, will be accepted at maturity. Have the goodness when you advise the receipt of the present, which I trust will be as soon as possible, to inform me the standing of the acceptors."

This letter and bill were received by *Williams*, on the

21st *October*, 1825. The plaintiffs in error (defendants below) had no notice of the before-mentioned letter of *Attwood*, and of the defendant in error. *Williams* stopped payment on the 24th day of *October* aforesaid, and a docket was struck against him on the 25th of the same month; upon which a commission of bankrupt, dated the 27th of the same month, duly issued, and he was duly declared a bankrupt immediately afterwards. As well at the time *Williams* received the bill in question, as at the time of his bankruptcy, the balance of the account between him and the defendant in error was in favour of the latter, to the amount of upwards of 3,000*l.*, exclusive of the bill. On the morning of the 22nd of *October*, when the discount hereinafter mentioned was made, the balance in favour of *Williams* with the plaintiff in error was 3,784*l.* 10*s.* 10*d.* About 11 o'clock of that day, *Williams* indorsed the bill in question, with others, amounting in the whole to 7,081*l.* 17*s.* 9*d.*, to the plaintiffs in error, who were his bankers, and in the habit of discounting for him very largely; and the said bills were *bond fide* discounted for him, and credit given to him for the amount less the discount; and subsequently, *vis.* at the clearing house, about 5 o'clock in the evening of that day, the plaintiffs in error paid *Williams's* acceptances due that day, to the number of thirty-two, and three drafts, amounting altogether to 10,683*l.* 18*s.* 1*d.* The bill in question was honored at maturity, and the amount received by the plaintiffs in error on the 28th *November*, 1825.

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Upon these facts the Court of *King's Bench* were of opinion, that the defendant below was entitled to recover (a); and now a writ of error having been brought, the case was argued by

Patteson, for the plaintiffs in error.—The question in

(a) 8 B. & C. 622.

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this case depends entirely upon the construction of this indorsement, “pay to *Williams*, Esq. or order, for my use.” Admitting, as a general principle, that an indorsement may be qualified or restricted, the words here used do not constitute a restrictive indorsement. The words “for my use,” are not addressed to the acceptors of the bill, but to *Williams* alone, and direct to what account the proceeds of the bill, when received, are to be applied. In the Court below, the case of *Snee v. Prescott* (a), was cited, for the purpose of introducing a *dictum* of Lord *Hardwicke*, that “promissory notes, and bills of exchange, are frequently indorsed in this manner, ‘pray pay the money to my use,’ in order to prevent their being filled up with such an indorsement as passes the interest.” Such words would clearly restrict the negotiability of the bill, but the words are, in this case, totally dissimilar; for the money is not, in the first instance, to be applied to the use of the indorser, but to be paid to a third individual, or his order, by whom, when received, the money is to be applied. For the same purpose, the case of *Ancher v. Bank of England* (b), was cited, in which the indorsement was “the within must be credited to Captain *Moreton L. Dahl*, value in account.” An indorsement purporting to have been made by *Dahl*, was afterwards forged, and the Bank of *England* discounted the bill, but the acceptors did not pay it, and before it became due had failed. One *Fulgberg* paid it for the honour of the plaintiffs; and, upon the ground that the indorsement had restrained the negotiability; they brought an action for money had and received against the Bank of *England*. A nonsuit was directed by Lord *Mansfield*; but, upon cause being shewn, he with *Willes* and *Ashurst*, Js., thought the indorsement restrictive, and that the plaintiffs were entitled to recover; but *Buller*, J., thought otherwise; upon which Lord *Mansfield* said, the

(a) 1 Atk. 245.

(b) Dougl. 637.

whole turned upon the question, whether the bill continued negotiable; and if they altered their opinion, they would mention it again. The case, however, was never mentioned afterwards; and, upon a new trial, the Chief Justice directed the Jury to find for the plaintiffs, which they did. No doubt could now be entertained upon the effect of such an indorsement, and no question could then have arisen but for the forgery. *Dahl* was the first indorsee to whom alone the money could be paid, for there were no words that would authorize an indorsement by him; but on the contrary, the indorsement was as restrictive as possible. It is not, however, so in this case; for, by the very terms of the indorsement, the money is payable to the order of *Williams*. These authorities are therefore inapplicable; and by the words, "or order," which is the distinguishing feature of this case, the bill in question was *prima facie* transferable. By the effect of these words, the legal title was in *Williams*, and he might transfer his interest in the bill by indorsement, though, as between the plaintiff and himself, the application of the money might be restricted after the money had been received. Such an indorsement was considered in the case of *Evans v. Cramlington* (a). There the bill was payable to "*Price*, or order, for the use of *Calvert*." *Price* indorsed it to *Evans*; after which an extent issued against *Calvert*, and the money due upon it was seized to the use of the King. These facts were pleaded, and upon demurrer two points were raised; the one, whether *Calvert* had such an interest in the money as might be extended; and the other, whether *Price* could indorse the bill, or had more than a bare authority to receive the money and apply it to the use of *Calvert*. The Court of *King's Bench*, and afterwards the Court of *Exchequer Chamber*, upon error, decided that the interest of *Calvert* could be extended; and that *Price* had authority

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(a) Carth. 5; 2 Vent. 307; Skin. 264; 1 Show. 4; Chitty on Bills, 160.

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to indorse the bill, and judgment was given for the plaintiff. It does not appear whether this was or was not a case of discount; but that fact is here immaterial, for the discount was, in this case, *bond fide*, and at the time the plaintiffs in error were considerable debtors to *Williams*. The case, therefore, is precisely in point. But if the words be doubtful, they must be construed most strictly against the party using them, and will not be inoperative if understood as a direction to *Williams* to apply the bill, or the proceeds of it, when received, to the use of the indorser. It was consistent with the character of *Williams*, as agent, that the money should be so applied, and it could make no difference to the indorser at what time the money was received; but it was impossible that the plaintiffs in error could see to its application. If the indorsement had been "which place to my account," or "which hold to my use," the plaintiffs in error would not have been bound to look to the application of the money. These words are, in effect, the same, and cannot operate to restrict the indorsement, for which there could be no motive, *Williams* being the accredited agent of the defendant in error. They merely direct the mode in which the money was to be applied, when received—whether from the acceptor, with whom the indorser had no connection, or from an indorsee, is immaterial—and in the language of Lord *Holt*, in the case of *Evans v. Cramlington*, created a trust in *Williams* for that purpose, which could not, by indorsement, be transferred to the plaintiffs in error. A contrary construction would be highly prejudicial to the commercial interests of the country, and tend to restrict the free circulation of bills of exchange. In *Truettel v. Barandon* (a), which was relied upon in the Court below, the indorsement was "pay to *J. P. De Rouse*, Esq., or order, for account of Messrs. *Truettel & Wurtx*." But that was a case of deposit and

(a) 1 Moore, 543; S. C. 8 Taunt. 100.

not of discount, and upon that ground the decision of the Court proceeded. *Dallas*, J., observed, "the defendants take these bills from *De Rouse* as a deposit, expressly by way of security, and not by way of discount;" and *Burrough*, J., taking the same view of the case, said, "there is a wide difference between bills of exchange discounted, and bills of exchange deposited. Where the bills are deposited, the money cannot be applied according to the direction of the indorser; but, if the money be paid, it becomes the duty of the indorsee to place it to the account of the indorser, and the party who discounted the bills is not bound to look to the application. If this distinction be correct, it must govern the decision in the present case. The general rule of law is, that a bill payable to order is negotiable; and to restrict that negotiability, the words must be clear and explicit. *Robertson v. Kensington* (a). But generally, neither an acceptor nor an indorsee is bound to see to the application of the money.

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Pollock, F., for the defendant in error.—It cannot be denied that an indorsement may be restricted. And the only question is, whether the words here are available for that purpose. Upon this point the cases of *Snee v. Prescott* (b), and *Edie v. The East India Company* (c), are express authorities. In the latter, *Wilmot*, J., speaking of an indorser says, "to be sure, he may give a mere naked authority to a person to receive it for him, he may write upon it, 'pray pay the money to my servant for my use;' or use such expressions as necessarily import that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him, and for his own use. In such case, it would be clear that no valuable consideration had been paid him. But at least that intention must appear upon the face of the indorsement." These

(a) 4 Taunt. 30.

(b) 1 Atk. 247.

(c) 2 Burr. 1227.

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cases shew, that, without the words "or order," an indorsement, in the form of the present, will prevent the negotiability of the bill. Now the words "or order" do not enlarge the import of the indorsement, but merely empower *Williams*, the trustee, to authorize a third person to accept the money, which, but for these words, he must have received himself. Similar words occurred in the cases of *Robertson v. Kensington*, and *Truettel v. Barandon*, but the indorsements were nevertheless held in those cases to be restrictive. It is true, that the latter was a case of deposit, and upon that ground a distinction was taken in the Court of *Common Pleas*. But it does not follow, because the case of a deposit is stronger against an indorsee than that of a discount, that the same rule should not equally apply to each. In fact, if the words "to my use" have any meaning, they must operate as a clear notice, that the property in the bill is in another, and that the holder, who is merely a trustee, cannot, by virtue of the words "or order," transfer the bill without by the same act transferring the trust. The words "to my use" ought at least to induce the indorsee of the bill to ascertain the nature of the indorser's interest. They have not done so in the present instance, and were therefore guilty of negligence; in consequence of which, upon the authority of *Gill v. Cubitt (a)*, and the subsequent cases, they are liable over to the indorsee; for if due inquiry had been made, he would not have been deprived of his money. The indorsement threw no obligation upon the acceptors, for *Williams* had authority to indorse it; they, therefore, were justified in paying it to the indorsees, who could only receive the money for the use of the defendant in error.

Patteson, in reply.—The negotiability of the bill is, by the argument, conceded; and yet it is said, that the in-

(a) 5 D. & R. 324; 3 B. & C. 466.

dorsee is bound to apply the proceeds to the use of the defendant in error. Negotiability implies a power to transfer a beneficial interest in the proceeds of the bill, and not a mere naked right to appoint a deputy to receive the money. But it is said, that, by the indorsement, the plaintiffs in error became trustees. If that be so, the greatest inconvenience might arise, for the argument is equally applicable to any number of indorsees. No argument can be founded upon the assumption of negligence; for that question was not left to the Jury, but, on the contrary, they found that the bill was *bond fide* discounted.

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BEST, L. C. J.—The indorsement upon this bill of exchange is special, and restricts its negotiability. The object of the indorser was to prevent the money, received in respect of the bill, from being applied to the use of any person other than himself. Whoever, therefore, received the money, received it for the use of the indorser. And as the plaintiffs in error took it upon the indorsement of *Williams*, and upon his account, it being indorsed to him for a special purpose, to receive the money merely, and hold it to the use of the indorser, he could not confer a greater interest than the indorser had given him, which was a mere trust, and they paid the money in their own wrong. The trust was apparent upon the face of the instrument itself. No inconvenience can arise to the commercial interests of the country, by limiting the operation of an indorsement so expressed; the only effect will be to make individuals more cautious in their transactions in future. Unless the words “for my use” have no meaning, it is obvious, upon looking at the indorsement, that some inquiry was necessary; and if a meaning can be found for them, the Court must apply them in the manner in which they were intended to operate. It is said, that by holding the indorsement to be restrictive, we shall render the words

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“or order” inoperative. But they are not useless, for, had they not been inserted, *Williams* must have attended personally to receive the money; and being inserted, they obviate that inconvenience, and enable him to appoint an agent to receive and give a discharge for the amount. It was, notwithstanding, the intention of the indorser that the agent, appointed under that authority, should receive the money for his use. This intention has been defeated by the plaintiffs in error, who have received the money, but have not paid it over according to the directions of the indorsement. We, therefore, are of opinion that the defendant in error is entitled to recover, and that the judgment of the Court below should be

Affirmed,

EXCHEQUER CHAMBER IN EQUITY.

BEFORE THE LORD CHIEF BARON.

1828.
Dec. 19, 23.
1829.
May 12th.

LEWES v. MORGAN.

In taking an account of the pecuniary transactions between a client and his

THE defendant, *John Morgan*, appealed to the House of Lords from the several orders of this Court, of the 8th

attorney, the latter also filling other confidential situations, the production of a bond executed by the client to the solicitor is not alone sufficient evidence of a debt to that amount, but the obligee or his representatives are bound to prove the actual payment of the money secured by the bond.

Where, in taking an account of various dealings and transactions between a client and his attorney, extending over a long period of time and the subject of protracted litigation, prolonged and increased by various appeals to the House of Lords, the Master ultimately made his general report of the balance due on the account, and, on the hearing of the cause for further directions, it appeared to the Court that the Master had made the report without reference to an exception to a separate report, which had been allowed by the Court and confirmed by the House of Lords, and without reference to certain other orders, which it was considered laid down a principle on which the account was to be taken; the Court, of its own accord, referred it back to the Master to review his report, having reference to such exceptions and orders. And the Master having afterwards made his report with reference to the exceptions and orders accordingly, but which was totally different from his former report, the Court confirmed it, over-ruling exceptions.

and 18th days of *November*, 1817^(a), and a subsequent order of the 27th of the same month. The appeal was heard during the lives of Sir *Watkin Lewes* and *John Morgan*, but judgment was not pronounced till some time after their decease, and the proceedings had been revived.

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1829.

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v.
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403.

3 L & Fin - 195

1 Gouge - 279

The House of Lords, by an order dated 5th *July*, 1825, affirmed the order of the 8th *November*, 1817, over-ruling the exceptions, and reversed the other orders, with this addition, "It is ordered that the Court of *Exchequer* do proceed according to the decree of the 2nd *July*, 1796, and the subsequent order of the 11th *July*, 1810, made upon motion on behalf of Sir *Watkin Lewes*, and consented to by *John Morgan* and the mortgagees."

The Master made his general report, dated 11th *December*, 1826, and the cause came on for further directions on the 3rd *May*, 1827; when the Court referred it back to the Master to review such report, having regard to the first exception, taken by the late defendants *George Morgan* and *John Morgan*; to the fifth separate report of the late Deputy Remembrancer, dated the 1st *February*, 1817; and also having regard to the order of this Court, dated the 8th *November*, 1817; and also having regard to the order of the House of Lords, dated the 5th day of *July*, 1825; and that the said Master should inquire and report how far and in what respects those proceedings ought to vary the balance stated by him in his said report of the 11th *December*, 1826; and if the Master should find that such proceedings ought to vary such balance, it was ordered, that he should correct such balance accordingly.

The Master, by his report under this order, dated 10th *December*, 1828, certified, that having regard to the said exception and orders, he found that on the 3rd day of *September*, 1804, all principal monies and interest due to the mortgagees in the pleadings named upon their mort-

(a) See these orders and a detailed statement of the proceedings in the cause from the first institution of the suit, 5 Price, 42.

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gage securities, were fully paid off and satisfied, and that there was not any thing then remaining due to them from Sir *W. Lewes*, in respect of their mortgage securities; and that *John Morgan*, on the said 3rd day of *September*, 1804, had received for rents and profits, and produce of timber felled, the sum of 999*l.* 7*s.* 10*d.*, over and beyond all the said principal monies and interest due to, and received by him, for the said mortgagees. And he found that he did in and by his said report of the 11th day of *December*, 1826, not having the said exceptions and orders particularly brought to his consideration, find that the said *John Morgan* had received several sums of money therein particularly mentioned, amounting altogether to the sum of 13,000*l.*, and consisting of the following particulars, that is to say:—

	£	s.	d.
1775, <i>June</i> 3rd	6,610	0	0
1776, <i>April</i> 2nd	1,390	0	0
Ditto	4,000	0	0
<i>July</i> 11th	1,000	0	0

and which, having regard to the said exceptions and orders, he found to be inaccurate; and instead thereof, he found that the said *John Morgan* received the sum of 9,209*l.* 7*s.* 1*d.*, consisting of the following particulars, that is to say:—

1775, <i>June</i> 2nd, Cash of <i>William Farrer</i> and <i>James Morgan</i> , being the amount of the consideration for the mortgage of this date for 6,610 <i>l.</i>	4,209	1	7
1796, <i>April</i> 3rd, Ditto of <i>Henry Wilder</i> , being the consideration for the mort- gage to him of this date.	4,000	0	0
1796, <i>July</i> 11th, Ditto of <i>Chardin Mor-</i> <i>gan</i> , on an assignment of the benefit of a decree pronounced in favour of Sir <i>W. Lewes</i> , in a certain cause pending in Chancery, entitled <i>Lewes v. Popkin</i> .	1,000	0	0

And he further found by his said report, that the said *John Morgan* had paid, or applied to the account of the said Sir *W. Lewes*, the whole of the said sum of 13,000*l.*, at the times and in manner set forth in the first schedule to his said report; and which schedule contained the two sums or items following, that is to say:—

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1775, <i>June</i> 2nd, Paid bond, dated the 28th of <i>February</i> last, from Sir <i>Watkin</i> <i>Lewes</i> to <i>Chardin Morgan</i> , which was assigned to <i>William Farrer</i> , Esq. and the Rev. <i>James Morgan</i> , for the princi- pal sum of	2,400 0 0
Paid interest due on the said bond from the said 28th <i>February</i> to this day, be- ing three months and five days at 5 <i>l.</i> per cent.	31 19 5

making together 2,431*l.* 19*s.* 5*d.*; but the validity of the said bond being questioned, and the allowance of such two last-mentioned sums being now objected to without sufficient evidence being shewn of the consideration of the said bond, he had, having regard to the said exception and orders, required the defendant *Francis Morgan*, who, as executor of the late defendant *John Morgan*, claimed the benefit of the said bond, to go into and prove before him the consideration thereof; but the said defendant had declined to produce any new evidence of the consideration for the said bond, or to claim any less sum in respect thereof than the said sum of 2,431*l.* 19*s.* 5*d.*, relying upon the said report of the 11th day of *December*, 1826, and the evidence which was then before the Master, that is to say, an account dated the 24th day of *February*, 1777, signed by the said Sir *W. Lewes*, and the affidavit of the said *John Morgan*, sworn on the 12th day of *February*, 1819. And the five separate reports of the late Deputy Remembrancer, together with the order of the 5th day of

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July, 1813; and the orders of the House of Lords of the 8th day of *April*, 1816, and the 5th day of *July*, 1825, having been produced before him, he had taken the same into his consideration as explanatory of the said first exception to the said fifth separate report of the said Deputy Remembrancer, and the said orders of this Court, and of the House of Lords, and had thereupon disallowed the said sum of 2,431*l.* 19*s.* 5*d.*; but he had allowed to the said *Francis Morgan*, as such executor, in lieu thereof, several further payments, appearing by the said separate report of the 25th day of *June*, 1811, to have been made by the said late defendant *John Morgan* to and for the use of the said Sir *W. Lewes*, amounting together to the sum of 1,315*l.* 10*s.*, which payments the said *John Morgan* had treated as satisfied by the said bond for 2,400*l.*, and several bonds of the said Sir *W. Lewes*, alleged by him to have been covered thereby; and the said sum of 1,315*l.* 10*s.* being less than the said sum of 2,431*l.* 19*s.* 5*d.* by the sum of 1,116*l.* 9*s.* 5*d.*, he had deducted the said last-mentioned sum of 1,116*l.* 9*s.* 5*d.* from the aforesaid sum of 13,000*l.*, leaving the sum of 11,883*l.* 10*s.* 7*d.*; which, having regard to the said exceptions and orders, he found to be the correct and total amount of the several sums of money paid or applied by the said *John Morgan* to the account of the said Sir *W. Lewes*, instead of the said sum of 13,000*l.*; and from which said sum of 11,883*l.* 10*s.* 7*d.* being deducted the aforesaid sum of 9,209*l.* 7*s.* 1*d.* received by the said *John Morgan* as aforesaid; there remained the sum of 2,674*l.* 3*s.* 6*d.*, which was due to the said *John Morgan*, on balance of such receipts and payments. The Master, therefore, found that the said exception and orders ought to vary the balance stated in his former report in the respects aforesaid; and in order to ascertain how far the same ought to vary such balance, and in order to correct such balance accordingly, he had taken an account, in which he had charged the defendant *Francis Morgan*, as executor of the said

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John Morgan, with the said sum of 999*l.* 7*s.* 10*d.*, and the monies appearing by his said former report to have been received by the said *John Morgan*, and the defendants *Francis Morgan* and *James Morgan*, subsequently to the said 3rd day of *September*, 1804, for rents and profits of the estates of the said Sir *W. Lewes*, amounting, in the whole, to the sum of 17,097*l.* 9*s.* 2*d.*; and he had, in the said account, allowed to the said *Francis Morgan* the aforesaid sum of 2,674*l.* 3*s.* 6*d.*, balance of the said receipts and payments of the said *John Morgan*, and the other monies appearing, by his said report, to be remaining due from the estate of the said Sir *W. Lewes*, exclusive of the mortgage monies, amounting in the whole to the sum of 7,835*l.* 4*s.* 4*d.*; and of which said sum of 7,835*l.* 4*s.* 4*d.* he found that the sum of 1,794*l.* 19*s.* 5*d.*, balance of taxed costs, was the only sum which carried interest. And he found that instead of there being a balance of 3,597*l.* 1*s.* 10*d.* due from the estate of the said Sir *W. Lewes* at the date of his said report, as therein stated, there was then due from the said defendant *Francis Morgan*, as executor of the said late defendant *John Morgan*, to the estate of the said Sir *W. Lewes*, the balance or sum of 6,534*l.* 7*s.* 7*d.* And he found that the said balance of 6,534*l.* 7*s.* 7*d.* ought to be further varied, in respect of the several sums received since the date of his said report therein mentioned; and that the balance then due from the said *Francis Morgan*, as executor of the said *John Morgan*, to the estate of the said Sir *W. Lewes*, amounted to the sum of 8,227*l.* 10*s.* 2*d.*

To this report the defendant, *Francis Morgan*, took five exceptions.

The substance of the first exception was, that the Master, having regard to the exception and orders, ought not to have stated that, on the 3rd *September*, 1804, all principal money due on the mortgages was paid off and satisfied, or that the said *John Morgan* had, on the said 3rd day of *September*, 1804, received for rents and profits, and timber felled, 999*l.* 7*s.* 10*d.* beyond the principal money and

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interest due on the mortgages, inasmuch as the exception and orders did not conclude or establish any account by which the said principal monies and interest appeared to have been paid off, or by which the said *John Morgan* appeared to have received such monies as aforesaid.

The ground of the second exception was, that the Master was not warranted by the exception and orders, in entertaining any question of the validity of the bond for 2,400*l.*, or any objection to the allowance of the principal money and interest secured thereby, or in requiring the defendant *Francis Morgan* to prove the consideration for the said bond, the same having been established by the evidence before the Master, at the time of making his former report, and also by the same report, and the allowance of the said principal sum and interest not being affected by the said exception and orders. And that the Master was not warranted by the order directing him to review his report, to take into his consideration the five separate reports, or the orders referred to by him, none of them affecting his said former report, or the evidence before him at that time. The three other exceptions went to the allowance or disallowance of the sums mentioned in the report, and were founded on the same point as the two first exceptions.

Mr. *Lowndes* and Mr. *Morgan*, for the exceptions.

Mr. *Jervis*, Mr. *Tinney*, and Mr. *West*, for the Master's report.

Mr. *Fonblanque*, J. S. M., and Mr. *Knight*, for the personal representatives of Sir *W. Lewes*; also in support of the Master's report.

May 12th.

LORD CHIEF BARON.—This is a case on exceptions to the Master's report. The questions arise on very complicated accounts, of all cases the most difficult; and the present, from many causes, involved in tenfold darkness,

chiefly, however, from the original complexity of the transactions, from the great length of time since they took place, (above half a century), from the death of every person concerned in them, and from the multiplicity and intricacy of the proceedings.

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In 1778, the original plaintiff, Sir *Watkin Lewes*, and *John Morgan*, one of the original defendants, became acquainted. Sir *W. Lewes* was a *Welch* gentleman, the husband of a *Welch* lady, possessed of considerable real estate. He was, besides, a statesman, a strong advocate of the liberty of his country, a distinguished magistrate of *London*, being an Alderman, and in his turn Lord Mayor. In other respects, his chief distinctions were, folly, improvidence, stupidity, and obstinacy. Mr. *Morgan* was an attorney, who, as he has been traced in this cause, appears to have been a person not at all disinclined to assist his friends and clients in their pursuits however unwise, and in getting rid of their property, provided he could transfer it into his own pocket. During the friendship of these two persons, Sir *Watkin* had election contests; of course, these could not be starved. He had also many other calls for money. Mr. *Morgan* was Sir *Watkin's* friend, agent, attorney, and confidential adviser. He undertook not only his law business, but to procure money to supply his occasions, and advanced to Sir *Watkin*, as he has said, various sums. These sums were at first represented to be the money of *Chardin Morgan*, *John Morgan's* brother, in *John Morgan's* possession. On the other hand, Sir *Watkin* and his wife appointed their estates in *Glamorgan* and *Carmarthen*, to *George Morgan* and *James Morgan*, two other brothers of *John Morgan*, for a term of five hundred years in trust, to raise a sum of 12,000*l.* In the meantime monies were supplied to Sir *Watkin Lewes*. The manner in which these supplies were furnished, appears to have been this: *Morgan*, being agent for Sir *Watkin*, was also agent for *Chardin Morgan* and others of his relations; he had also some credit, and some-

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times a little money. When it suited him, he advanced money to Sir *Watkin*, not at all uniformly by handing it over to Sir *Watkin* in person, or applying it to his use at the moment the advance was supposed to be made, but by giving him credit for it, by supposing that he, *Morgan*, as agent for Sir *Watkin*, had received from himself, *John Morgan*, as agent for somebody else, a certain sum on Sir *Watkin's* account; then Sir *Watkin* was charged with this money. At first, the name of *Chardin Morgan*, the brother of *John*, was chiefly used in this drama. I have traced, as carefully as I have been able, from the materials within my reach, which are chiefly *Morgan's* own case on his last appeal, and Mr. *Price's* report, in his fifth volume, and the opinions of the Court, the conduct of the parties at this period of their connexion; and the true representation of it is, that Mr. *Morgan's* right hand, as agent for himself and others, particularly for *Chardin Morgan*, put into Mr. *Morgan's* left hand, as agent for Sir *Watkin Lewes*, various sums; and when this was done, Sir *Watkin* was considered as indebted in the sums so put into Mr. *Morgan's* left hand. Sir *Watkin* gave various bonds, in which *Chardin Morgan* was made the obligee. In the course of the proceedings, it afterwards sufficiently appeared, that there was no truth in the representation, that *Chardin Morgan* had advanced the money, and that no money had been advanced, or at least none sufficiently corresponding in date and amount with the securities, to afford evidence of a connexion between them. All this was done by Mr. *John Morgan*, and through his hands, he being the agent, attorney, and law adviser of Sir *Watkin Lewes*.

The relative character in which these parties stood with respect to each other must not be forgotten for a moment in this case. The principle arising out of it is the foundation of all the most important decisions. The accounts between them having been found to be so confused and perplexed, as to baffle every attempt at investigation; the

tribunals had to consider on which party the burthen of proof lay, and on whom any loss, arising from the darkness in which they were involved, ought to fall. They have been of opinion, that, in the situation in which *John Morgan* placed himself, *he* was bound to explain every thing; that the mere production of documents, which in any other case, and if he had been a stranger, would have been sufficient *prima facie* evidence, and, if unimpeached, conclusive evidence to establish his demand, proved nothing in this case for him. This is the principle to be inferred from the orders of the Court and of the House of Lords, and also from what has been said by some of the judges in both places. It appears to me, that, without the adoption of this principle, what has been done could not be supported.

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By the 28th of *February*, 1775, Sir *Watkin Lewes* had executed a bond for 120*l.*, another for 220*l.*, another for 500*l.*, another for 950*l.*, and another for 400*l.*; and *Morgan* represents, that, on this 28th of *February*, Sir *W. Lewes* settled an account with him, and of the interest due upon these bonds; and that he consolidated them, adding a sum of 174*l.*, not then advanced, but which was about to be advanced, making in all 2,400*l.* For this consolidated amount, Sir *Watkin* gave a bond to *Chardin Morgan*, as the obligee. The bond is dated the 28th *February*, 1775. One of the bonds merged in this obligation for 2,400*l.*, was for 500*l.*, and seems to have been dated in *January*, 1774, and became, in progress of the cause, the subject of particular inquiry, as did also the bond for 2,400*l.* The most important question, at present, respects the bond for 2,400*l.* It was represented by *John Morgan*, that this 2,400*l.* was due to *Chardin Morgan*. There seems much reason to believe that this was entirely false, and that, in this respect at least, he misrepresented the transaction, and imposed upon Sir *Watkin*. In a very short time, however, *John Morgan* appeared as the owner

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of the bond. In *March*, of the same year, a marriage was agreed upon between *John Morgan* and a lady of the name of *Farrer*. *William Farrer* and *James Morgan*, a brother of *John Morgan*, were the trustees of the settlement made upon this marriage. Some *Three per cent.* and *East India* Annuities, the property of the lady, were assigned to these trustees in settlement; and on the part of *John Morgan*, and as his property, Sir *Watkin's* bond for 2,400*l.*, was assigned by *Chardin Morgan* to the trustees of the settlement, and other property of *John Morgan's* was settled in the usual way, with power, it would seem, to vary the securities.

In the following *June*, *Morgan* contrived that the trustees of the settlement should advance to Sir *Watkin* a sum on the security of his estate. It was thus managed: they raised out of the lady's fortune 4,209*l.* 7*s.* 1*d.* to this was added Sir *Watkin's* bond for 2,400*l.*, and a further sum of 12*s.* 11*d.* was furnished from *John Morgan's* private purse to make even money. These sums amounted together to 6,610*l.* To secure this sum of 6,610*l.*, the trustees of the term of five hundred years, which had been created of Lady *Lewes's* estates, were to assign that term to the trustees of *Morgan's* settlement. *James Morgan*, one of *John Morgan's* brothers, happened to be a trustee both of the term and of the settlement; he was therefore removed as a trustee of the term, and *Chardin Morgan* substituted to his place. And then, by a deed dated the 2nd of *June*, 1775, between Sir *Watkin Lewes* and his wife, of the first part; *George* and *Chardin Morgan*, the trustees of the term, of the second part; and *Farrer* and *James Morgan*, the trustees of the settlement, of the third part; in consideration of 6,610*l.*, paid to *George* and *Chardin Morgan*, the term was assigned to *Farrer* and *James Morgan*, redeemable on the payment of the 6,610*l.* This 6,610*l.* was not paid to the trustees of the term, nor to Sir *Watkin Lewes*. The bond, indeed, is said to have

been delivered up to him. But it is not pretended, that one shilling of the money was paid by the trustees of the settlement to Sir *Watkin Lewes*. *Morgan's* representation is, that it was paid by his trustees to himself, as the agent of Sir *Watkin Lewes*. This is not quite Mr. *John Morgan's* right hand to his left, but it approaches near to it; and all that Sir *Watkin* had for his land, was Mr. *John Morgan's* accountable receipt. However, all the regular deeds were executed upon the occasion, and Mr. *John Morgan* was appointed receiver, with ample powers of all description.

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In *April*, 1776, that is, within less than a year, the trustees of the settlement are represented to have advanced to Sir *W. Lewes* a sum of 1,200*l.*, which, with 190*l.*, said to be advanced by *John Morgan*, making 1,390*l.*, was, by a deed poll, dated the 2nd of this month of *April*, 1776, made a further charge on the five hundred years' term to *Farrer* and *James Morgan*, the trustees of *John Morgan's* settlement. This sum, like the former, is stated by *John Morgan* himself to have been received, not by Sir *Watkin Lewes*, but by the same *John Morgan*, as the agent of Sir *Watkin*. Next day the trustees of the marriage settlement of *James Morgan* advanced 4,000*l.* This was secured by an assignment dated the 3rd *April*, 1776, of the term of five hundred years, subject nevertheless to the prior mortgage. This money was in like manner not paid to Sir *Watkin*, but to *John Morgan* as his agent. At the same time, *John Morgan's* receivership of the rents was extended to secure the interest of this second mortgage. In *July*, 1776, another sum of 1,000*l.* was raised, as it is said, from *Chardin Morgan*, upon an assignment of some claim of Sir *W. Lewes*, in a cause of *Lewes v. Popkin*, in Chancery. It is said, like the rest, that this was paid into the hands of *John Morgan*, as agent for Sir *Watkin*. There were other transactions, which need not be mentioned.

Next year, *Morgan*, it appears, stated his account, which,

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on the 24th *February*, 1777, Sir *Watkin* signed. In this account *Morgan* charged himself with all monies raised by all the different mortgages, to the amount of 13,000*l.*, and discharged himself by various payments. One is the bond for 2,400*l.* stated as paid. There are also large sums for bills of costs. The result is, a balance due to *Morgan* of 567*l.*, for which Sir *Watkin* seems to have given a note of hand. This account Sir *Watkin Lewes*, by a memorandum, dated the 24th of *February*, 1777, allowed, errors excepted. In this settlement, as in all other transactions, the enlightened understanding of Sir *Watkin* had no other assistance but his attorney Mr. *John Morgan*. In any other circumstances, and as between parties in any other relation, this memorandum would probably have rendered the difficulties in the way of the relief afterwards sought by Sir *Watkin* insurmountable. It would have thrown the *onus* upon him, and, being *prima facie* evidence against him, would have made it requisite that he should disprove every item contained it, which he chose to question. The House of Lords, however, and this Court, in concurrence with the supreme jurisdiction, have adopted a different principle. Taking into consideration the situation and conduct of *Morgan*, as the attorney, they have set this account at nought, and have even disregarded the more solemn instruments signed by *Lewes*, viz. the mortgages and bonds, and required the actual advances to be established by evidence, beyond the mere production of the instruments themselves.

After this account, the friendly intercourse between these two parties did not long continue. *Morgan* probably supposed that he had done Sir *Watkin Lewes*' business, and his own too. Having made, as he stated, some further advances, he, in the following year, 1778, brought one action in the name of *Chardin Morgan*, and another in his own name, against Sir *Watkin Lewes*, who gave warrants of attorney to confess judgment in both: in that at the suit

of *John Morgan* for 1,142*l.*, and in the other for 1,547*l.* 19*s.* In *August*, 1778, *Morgan* brought ejectments, and got into possession of the estates. He is charged with rents, in the accounts taken in the cause, from Lady-day, 1779. This quarrel dried up all Sir *Watkin Lewes's* resources. *Morgan* was in possession of his estates, as well such as were in mortgage, as such as were not.

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After some ineffectual attempts at an arrangement by reference, in *Hilary Term*, 1783, the original bill was exhibited by Sir *Watkin Lewes* against *John Morgan*, and the trustees and mortgagees, charging, amongst other things, that the monies mentioned in the mortgages, or the greater proportion of them, never had been really advanced; that the 2,400*l.* bond, if signed at all, was not for money actually paid down, but was delivered to *Morgan* to enable him to raise money upon it. The answers having been filed, it appears that *Lewes*, probably from lack of means, was in danger of having his bill dismissed for want of prosecution. At last, in *July*, 1796, the Court made the decree in the cause. It directs an account of all sums received by *John Morgan*, as agent to Sir *W. Lewes*, and also of the sums received by him as agent to the mortgagees, and when and how they were applied to their accounts respectively; to tax *Morgan's* bills of costs, and to take an account of the rents and profits of the estates received by *Morgan*, as well those in mortgage, as those not in mortgage; and, in case of the loss of vouchers, *Morgan* was to make oath that the vouchers had once existed, and of their contents. Lord Chief Baron *Macdonald*, in stating the reasons on which the decree is founded, relies upon the extreme and apparent inaccuracy of *Morgan's* accounts, as stated in his answer and schedules. He is reported to have expressed himself thus: "On comparing the answer with the schedules, there appears to be no sort of accuracy in the accounts. Some are without dates, and they are so confounded, as to have ma-

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terially varied the balance; and so much irregularity and obscurity prevail, as to baffle investigation." Such was the impression made, at an early stage of the proceedings, by *Morgan's* conduct.

This decree was followed by a series of litigation, the like of which is rare in the judicial history of the country. Much of it was occasioned by the malignant spirit with which the proceedings were conducted. These passions have, I trust, subsided. All the original actors are withdrawn from the scene, and the gentlemen now interested have, I hope, no other wish but to meet each other fairly, to have their rights ascertained, and, in the least expensive and shortest way, to put an end to this long protracted contest. Their characters can be in no manner implicated in the present result.

In order to satisfy myself upon the points at present before the Court, I have been forced to trace these proceedings carefully, so far as I have had materials; but I shall notice only such as appear to me to be important to the present question.

The first proceeding to which I shall refer, is an order dated the 17th of *June*, 1801, on the application of *Lewes*, and which does not seem to have been resisted by *Morgan*. It authorized the Deputy Remembrancer to make a separate report of all dealings and transactions between Sir *W. Lewes* and *John Morgan*, so far as related to the monies actually received and paid on account of the mortgages and judgments, and of all sums received by *John Morgan*, as agent to Sir *Watkin Lewes*, as also to the mortgagees; and when, and how, such sums were applied to their accounts respectively; and of the rents and profits of the mortgaged estates, and of the estates not in mortgage.

It is under this order that the whole litigation was carried on until a very late period. It seems to me, to have been concluded by the order of the House of Lords, of the

5th *July*, 1825. The obvious intention of this order was to ascertain the amount of the real lien on the estates, that Sir *W. Lewes*, by discharging it, if he found the means, might be restored to the possession. It appears to me, that the House of Lords, by the order of *July*, 1825, have most irrevocably ascertained the amount of that lien, so far as respects the mortgages. Since that order, the proceedings regard the general and personal account between *Lewes* and *John Morgan*; and the exceptions now before the Court relate to that account. I have entertained no doubt respecting the first exception; and a few sentences will, I trust, explain the foundation of the opinion I have formed. Some of the others are more difficult. I shall be obliged to advert particularly to them hereafter; but, in the meantime, I think I cannot, without stating in a general way the question that arises upon them, shew the bearing upon the question of the statement I feel it necessary to make of the principal proceedings under the order for the separate report, up to the decision of the House of Lords, on the 5th of *July*, 1825.

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The points at present in discussion, arise on the Master's general report, and chiefly regard the bond for 2,400*l.*, which I have already mentioned. Though it is not disputed that such a bond, executed by Sir *W. Lewes*, once existed; although it was acknowledged by him in the account dated 24th *February*, 1777, and was sworn to in *Morgan's* affidavit, made in 1819; yet, under the particular circumstances, the Master has rejected it as evidence of the debt, and called upon *Morgan's* representatives for proof of the actual advance of the money. It is contended, on the part of *Morgan's* representatives, that the Master ought not to have done this. On the other hand, it is said, that this bond of 2,400*l.* was originally, in fact, comprised in the mortgage for 6,610*l.*; that, with a view to the amount of this mortgage, it was the subject of laborious inquiry, and of much discussion, and was ultimately, upon a careful review of

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all circumstances, rejected as part of the mortgage; and that, therefore, it cannot be now introduced as part of the personal demand in the general account. *Morgan's* representatives reply to this—that all that has been hitherto decided is, that it should not constitute part of the mortgage money, so as to charge the land, but that nothing has been done or said which should prevent it from being *prima facie* evidence of a debt from Sir *W. Lewes* to *John Morgan*; on the contrary, it has been intimated, that though rejected from the mortgage, it might form part of the personal account. Such is the state of the present controversy. It must be obvious, that the deduction of this bond from the mortgage account does not necessarily decide, that it shall not *qua* bond be included in the personal account. But, on the other hand, if, on examining the proceedings, it should appear to have been rejected upon facts, and upon principles which would be equally fatal to its forming *prima facie*, and as a bond, part of the personal account, it would be a strange contradiction in these proceedings, between the same parties, and upon the same documents, to sustain it in the one case, when it had been, by the highest authority, rejected in the other, upon principles alike applicable to both. It becomes, therefore, as it seems to me, of absolute necessity to examine the contest as to this bond, though it occurred upon the discussion as to the mortgage.

The Deputy Remembrancer made his first separate report, of the date of the 15th *July*, 1802. The confusion which distinguishes the parties, seems to have been communicated by them to the Deputy Remembrancer, for he reports, that *John Morgan* being employed by *Lewes* to raise money for him, advanced him various sums, the property of *Chardin Morgan*, and took the plaintiff's bonds to *Chardin Morgan*, which bonds were afterwards consolidated into the bond for 2,400*l.*, which was the proper money of *John Morgan*. It is now indifferent what he

meant. For this report was excepted to by Sir *Watkin*, and the exception was, "that there was no evidence that the several sums, the component parts of the 2,400*l.*, were advanced by *Chardin Morgan* or *John Morgan*, or if they were advanced, they were the money of *John Morgan*." There were many other exceptions, which it would be foreign to my present purpose to notice. They came before the Court in *July*, 1804. It is not material to relate what passed. It is sufficient to say, that all the exceptions were *disallowed*. In order, however, to shew the difficulties which this case presented, I will read a passage from Lord Chief Baron *Macdonald's* judgment, as it is reported: "The delay of twenty years and upwards has entangled this matter to such a degree, that there can be no surprise that men, not intuitively gifted with the power of unraveling folly, stupidity, extravagance, absurdity, carelessness, and every thing that can tend to entangle a human transaction, cannot understand this cause (a)." This was in 1804; and now, in 1829, the Court is called upon to dispose of nearly the same question; the lapse of twenty-five years, and the death of all the parties, have not assisted in dispelling the obscurity. I shall now only say, that the Court disallowed Sir *Watkin's* exceptions. From this judgment he appealed to the House of Lords. That appeal was heard in *January*, 1807. Upon this occasion were unfolded those rules and principles which have been frequently brought under review, which have been often confirmed, and which have ruled this case throughout, and must rule it to the end. The first exception respected the bond of the 28th of *February*, 1775, for 2,400*l.* The exception was, that there was no evidence of any money being advanced, or, if it had been, that it was not the money of *Chardin Morgan*, the obligee in the bond, but of *John Morgan*. It would be viewing this question very lightly to suppose, that, ab-

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(a) 5 Price, 71.

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stracted from the situation in which *John Morgan* stood, it was of any consequence whether the money advanced was the money of *Chardin* or of *John Morgan*. To whom-ever it belonged, the bond had been assigned to the trustees of the marriage-settlement of *John*, and was their property; and the question in the cause as to the mortgage was between them and Sir *Watkin Lewes*. The materiality of the question arose thus: if the money had not been advanced by *Chardin Morgan*, but by *John*, as *John* had represented it to be *Chardin's*, and had taken the security in his name, then he had imposed upon Sir *Watkin*, and had concealed the truth of the transaction from him; he, the agent of Sir *Watkin*, introduces a third person as the lender of the money, and it turns out that so far as money is lent, he, the agent, is himself the lender. This is the constant course of treating a fraud, and, whenever it is ascertained, taints the instrument which the victim has executed, and deprives it of its legal and usual effect. Even without this circumstance, it appears that it would have been ineffectual, but with it the objection was doubly strong. And if this instrument would have been invalid in the hands of *John Morgan*, it was equally so in the hands of his trustees, who derived it from him. From thence, in part, arose the importance of the inquiry, whether the consideration of the bond was the money of *Chardin* or of *John Morgan*. If *John Morgan* were the real obligee, the bond could not be used as evidence of the debt. *John Morgan*, or his trustees, might recover what was actually advanced, but they must prove it by some other medium than the mere production of the bond.

What Lord *Redesdale* is reported to have said upon this occasion is this: "Now, I apprehend, that, in the dealings and transactions of parties of this description, and when an account of those dealings and transactions has been ordered to be taken by the Court, a person standing in the situation of solicitor, agent, general manager, and director, and having

[the management of] the whole concerns of the other party, and having made such other party execute instruments of this sort, which are therefore liable to suspicion, it becomes necessary not merely to rely on the instruments themselves, but to shew that the advances were actually made. And the nature of this decree shews that such was the original intention of the Court (a).” The order made by the House on the first exception is, as stated by Mr. *Morgan* in his case, on a subsequent appeal, in these words: “that it be referred back to the Deputy Remembrancer, to inquire and certify what sums were advanced by *John Morgan* to Sir *Watkin Lewes*, as the consideration of the bonds consolidated by the bond of the 28th of *February*, 1775, for 2,400*l.*, and when such sums were paid, and by whom, and to whom, and in what manner. No words can shew more distinctly, that neither the mortgage itself, to which *Lewes* was a party, and which included the 2,400*l.*, nor the account stated in 1777, which acknowledged the bond of 2,400*l.*, nor the bond itself, nor even the prior lesser bonds of which it was constituted, nor any one of them, nor all together, were to form a sufficient case to establish a charge for the nominal amount of 2,400*l.*, or of any part of it; for all these were before the House. *Morgan* had the affirmative of the issue, and therefore it was thrown upon him to establish that affirmative by other *media* of proof. It is said, that all this respects the question as to the amount of the mortgage money, and which only regards the controversy between the trustees of the settlement, and Sir *W. Lewes*; and that the present question respects the personal account. So, no doubt it does; but can any distinction be taken between them, nay, does not the principle apply more strongly to the personal account than to the mortgage account? On the mortgage account, the contest was with purchasers for a valuable consideration, the wife and children of the marriage. The trustees were struggling for them. If they were put to prove the con-

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(a) 5 Price, 83.

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siderations, because of the taint which the securities had received from the character and conduct of *John Morgan*, how much more distinctly ought the same course to be pursued, when it became the personal question of *John Morgan* himself? Are the securities, which are invalidated by his legal fraud, to be more powerful and effective for him, and in his hands, than in the hands of the innocent assignees? The objection to these securities, sustained and acted upon by the House of Lords, whose decisions bind me, is inherent in the original constitution, and must follow them on behalf of whatever person, and for whatever purpose they may be produced; and certainly, if there be one person more than another who ought to feel the infirmity of these documents, it is *John Morgan*, from whom that infirmity is derived. I must proceed to the statement of what has passed, but which I shall do very briefly, confining myself to the material points. The Deputy Remembrancer made afterwards four reports, the first of these, in obedience to the order of the House of Lords, which I have mentioned, and three others, in consequence of exceptions taken, and the allowance of those exceptions by this Court or the House of Lords. This ended in the ultimate rejection from the mortgage account of the whole 2,400*l.* The first bond consolidated in the 2,400*l.* was for 500*l.*, dated the 31st of *January*, 1774. The Deputy Remembrancer, on inquiring into the considerations of these securities, first certified that the consideration was 500*l.*, advanced by *Chardin Morgan*, through the hands of *John*. This being sent back to him, he certified that it was advanced by *John Morgan*, out of his own proper monies in bank notes, on the day of the date of the bond, viz. the 31st of *January*, 1774; this again being sent back to him, he certified that no evidence had been produced before him of the actual advance of the 500*l.* as the consideration of the 500*l.* bond. And that finding stands undisputed at this day. Another part of the consideration of the various bonds, which were con-

solidated in the bond for 2,400*l.*, the Deputy Remembrancer, in his third report, dated the 13th of *June*, 1809, states in these words, (it will be found in the twenty-third page of *John Morgan's* case, on the last appeal): “ I find that *John Morgan* did advance the several sums in the second schedule, amounting in all to 1,141*l.* 16*s.*, to *Lewes*, out of his own proper monies, as the consideration *pro tanto* of the several bonds for 220*l.*, 120*l.*, 950*l.*, and 400*l.*” These are the bonds, amounting in all to 1,600*l.*, which were consolidated in the bond for 2,400*l.* This finding being, as usual, sent back to him, hear what, in his next report, called the fourth, dated in *June*, 1811, he certifies upon the subject: “ That he had reviewed his report; and that, though he found that the several sums mentioned in his former report, amounting to 1,141*l.* 16*s.* were advanced by *John Morgan* to *Lewes*, yet, that he did not find that any of the said sums were advanced as the particular considerations for any of the bonds in his former report mentioned, no evidence of that fact having been produced before him; and none of the said bonds corresponding with the sums for which such bonds were given, and none of the said advances appearing to have been made at the respective times such bonds bear date, excepting in one instance, where a sum of 25*l.* appears to have been advanced on the 18th of *November*, 1774, the day of the date of the bond for 950*l.*” A comparison of the sums confirms this finding. The whole advance amounts to 1,141*l.* 16*s.*, and the amount of the bonds is 1,600*l.* Yet, these are the bonds which, upon this contest, are to prove a debt to their full amount, as comprised in the bond for 2,400*l.* These questions were brought again before the House of Lords in *April*, 1816. We are furnished by Mr. *Price* with some account of what was said by Lord *Eldon*, corroborated by Lord *Redesdale*. Lord *Eldon*, in Mr. *Price's* report of the case, is made to use the following language: “ The original decree of the Court of *Exchequer*, as modified by the subsequent order

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of this House, is calculated to afford the respondents extraordinary relief, going beyond the common course, in cases of redemption of mortgaged property, to a general account of all dealings and transactions that may have at any time taken place between the parties. In the meantime, there has been a separate report of the mere mortgage accounts, ordered to be taken as distinct from the general account between them, which general account yet remains to be taken. That separate account must first be disposed of, that the mortgage accounts may be first cleared, which must have been the object of it, and then the general account may be taken, and what may be disallowed the appellant in the separate report, may still be allowed to him in the general account. That may be the case with respect to the 2,400*l.* which has hitherto been disallowed by the Deputy Remembrancer, acting under the order of this House, declaring that those securities were not to be taken as evidence of the consideration for their having been advanced, and as not being admissible as an item in the mortgage account, because not supported by other evidence, but, on the contrary, falsified by the accounts, as far as they related to them. If, however, the money were actually advanced at any time, justice may yet be done to *Morgan* by the general report (a).” The opinion thus attributed to Lord *Eldon*, has been viewed as supporting *Morgan’s* case on the present occasion, because it is said, that he may have justice by the general report, if the money were actually advanced by him at any time; and so he might, but then he must comply with the previous conditions. He must prove the actual advance, by some other medium than the instruments themselves. To put any other construction upon Lord *Eldon’s* language, would be to suppose that that great judge had contradicted himself within the narrow limits of one opinion. Upon

(a) 5 Price, 140, 141.

the same occasion, he adds, "I am desirous of stating that the proceedings on this record establish the principle, that, in the case of an attorney who takes securities from his client, they cannot be used as conclusive evidence of their consideration as expressed, but require extrinsic evidence of the money having been actually advanced, to prove the transaction to have been *bond fide*(a)." He states the principle broadly and clearly. Lord *Redesdale* is equally clear, "This (said his Lordship) is the case of an attorney, who acts as general agent and legal adviser of his principal and client, obtaining his bond; he is therefore bound, by a very strict rule of law, to prove, by other evidence, the actual advance of the whole consideration(b)." I need hardly observe, that the principle is stated broadly by these two distinguished judges, and does not depend upon the account being a mortgage account, or a personal account; but arises from the relative situation of the two parties, and is equally applicable to every pecuniary transaction which can arise between them.

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I come now more closely to the present exceptions and shall desire it to be remembered, that the reports of the Deputy Remembrancer as to no evidence having been produced of any consideration for the 500*l.* bond, and of evidence having been produced of advances to the extent of 1,141*l.* 16*s.*, both remain unquestioned. The Deputy Remembrancer, by his fifth and last report, dated *February*, 1817, driven by respective orders of this Court, and of the House of Lords, at last deducted the 2,400*l.* from the mortgage money on the real estates, and reduced it to two sums of 4,209*l.* 7*s.* 1*d.*, and 4,000*l.*, making together 8,209*l.* 7*s.* 1*d.* He also certified, that he had taken the account of rents and profits received by *John Morgan*, as the agent for the mortgagees; that he had set off these rents against the principal and in-

(a) 5 Price, 142.

(b) Ibid. 143.

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terest of the mortgage money; and he found, that, on the 3rd of *September*, 1804, the whole had been paid, and that there remained in *John Morgan's* hands, after payment of the principal and interest, a sum of 999*l.* 7*s.* 10*d.*, and that he had not carried on the calculation of interest beyond the 3rd of *September*, 1804, when the whole mortgage money was paid. To this report, *John Morgan* excepted; the report was confirmed by this Court on the 8th of *November*, 1817. He appealed to the House of Lords, and it was again confirmed on the 5th of *July*, 1825.

I consider these points definitively and finally settled: viz. that the 2,400*l.* was excluded from the mortgage, and that the amount of the principal money on the mortgages was 8,209*l.* 7*s.* 1*d.*; that this was satisfied on the 3rd *September*, 1804; and that, at that date, *John Morgan* had to account for 999*l.* 7*s.* 10*d.*

Matters were in this situation, that is to say, the separate report was absolutely disposed of, when the present Master began to examine the materials for the general report. I presume, that the gentlemen who were concerned were new in the business, and were embarrassed by the extreme confusion and perplexity which the multiplicity and contradiction of the former proceedings on the separate reports had introduced into it. All the original parties appear to have been removed by time, and no doubt their solicitors followed. I do not, therefore, wonder at the misunderstanding which occasioned the last reference, and which seems to have been common to all parties. In truth, the case was not properly laid before the Master, as is quite obvious from the report itself. The Master takes the account of the mortgage money, and of the interest due; states the mortgage money to be to the whole amount that was ever claimed, viz. 13,000*l.*, and particularly states the first mortgage to be 6,610*l.*, in effect including in it the 2,400*l.*, which had been rejected by the House of Lords, as I have fully stated; and he computes

interest upon the whole down to the date of his report. *Morgan's* representatives objected to the report, because the Master had not calculated interest on the judgments. When these exceptions came before me, the error of the Master, respecting the mortgage, was pointed out. It appeared to me to be impossible, though no exception was taken by the representatives of *Lewes*, that I could permit the report to stand, because it was a direct contravention of every thing that had been done by this Court and the House of Lords, and a direct disobedience to their decrees.

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It was not fit that proceedings so inconsistent should remain part of the same record. I therefore directed the Master to review his report, having regard to the Deputy Remembrancer's fifth report, dated in *February*, 1817; to *Morgan's* first exception to that report; to the order of this Court of the 8th *November*, 1817, overruling that exception; and to the order of the House of Lords, of the 5th *July*, 1825, confirming the order of this Court, and disallowing *Morgan's* first exception; in short, to those proceedings which definitively reduced the first mortgage from 6,610*l.* to 4,209*l.*, that is, struck out the 2,400*l.*, and ascertained that on the 3rd *September*, 1804, the whole was paid, leaving a balance in *John Morgan's* hands of 999*l.*

The Master has now reviewed the report under those directions. It of course makes a material alteration in the balance: *Morgan* has now interest on a smaller sum, and no interest even on that sum after the 3rd *September*, 1804, when the mortgage money was entirely satisfied.

The balance found due by the Master's first general report, which is dated *December*, 1826, was the sum of 3,597*l.* 1*s.* 10*d.* from *Lewes* to *Morgan*; and the balance, as now stated, is due from *Morgan* to *Lewes*, and amounts to the sum of 6,534*l.* 7*s.* 7*d.* The difference is occasioned by the change in the amount of the mortgage, and by the

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stop put to the calculation of interest on the mortgage money after the 3rd September, 1804.

Upon the footing of the former report, *Morgan's* estate had interest on the mortgage money more than twenty years after it was satisfied. The first exception is this, [*his Lordship stated the exception at length*]. The answer to the exception is to read the former proceedings.

The fifth report of the Deputy Remembrancer expressly states that the mortgage money was paid off on the 3rd September, 1804, and that a further sum, to the amount of 999*l.* 7*s.* 10*d.*, had been received by *Morgan*. *Morgan* excepts to this report. The exception was over-ruled by the Court on the 8th November, 1817. And upon an appeal that order is affirmed. Nothing can be clearer than that the report and these orders decided that the mortgage money was paid on the 3rd September, 1804, and was overpaid by 999*l.* This exception must be over-ruled.

The second exception cannot be so shortly disposed of. In truth, the details which I have given of the former proceedings, and the exposition of the principles established by them, had in view this exception and the others depending upon it. The substance of it is, that the Master has not received the bond for 2,400*l.* and the settled account of 1777, together with an affidavit of *John Morgan's*, made, in 1819, under peculiar circumstances, as sufficient evidence of the bond debt, or, it may be, part of any debt. Such is the substance of it. It is manifest that the point of the controversy is, whether the bond for 2,400*l.* shall, as confirmed by Sir *W. Lewes'* acts, operate as evidence of a bond debt. I will recall to memory that the immediate consideration for this bond were other bonds, five in number, supposed to have been cancelled when it was given. Their amount was 2,190*l.*, and the difference, making 210*l.*, was to have been advanced upon some future occasion by *Morgan*. What I am about to say, will

apply equally to all those constituent bonds as well as to that in which they were consolidated. When the Master was compelled, in obedience to the orders of this Court and of the House of Lords, towards which I directed his attention, to reject entirely the 2,400*l.* from the mortgage account, it became just and proper that he should inquire how far he could give *Morgan's* representatives the benefit of it in their personal and general account. In doing that, he had to consider on what principles they were to have this benefit. His attention was necessarily turned to the principles on which the Court had hitherto proceeded. He could not avoid discovering that both the inferior and superior Court had acted upon the principle that the documents signed by *Lewes* did not afford sufficient evidence to establish a debt from *Lewes* to *Morgan*. What was done can rest upon no other foundation. It appears from the report of the proceedings, on the appeal of *April*, 1816, that when the discussion in the House was over, and the order to be made agreed upon, Lord *Eldon*, Chancellor, lest the principle should be misunderstood, rose up a second time, and used the words to which I have already referred.

If there is any man bold enough to question the proposition stated by that learned Judge as a universal maxim, applicable to all cases without exception, between all parties who shall sustain the characters mentioned, yet I am sure that no man can question its application to *John Morgan* and Sir *Watkin Lewes*, because it was for them it was said, and to them it was applied by the supreme judicature. The wisdom and justice of this rule is strongly exemplified by the history of these proceedings. When they began in 1783, in the first steps *Morgan* was triumphant: he came armed with his bond, with his mortgage, and with his settled account; and his demand was established to its full amount. When the principle now in discussion began to be acted upon, the representations,

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that the dealing was between *Chardin Morgan* and *Lewes* appeared to be entirely false, and that *John Morgan* was the real party; in the further prosecution, it turned out that the consideration of the 2,400*l.* was chiefly other bonds, and not money; and in following up the same view, it was ascertained by the Deputy Remembrancer's report, and stands now uncontradicted, that no one sum was ever advanced corresponding with any one bond: the whole sum shewn to have been advanced in fact was 1,141*l.* only, which was represented as the consideration for five bonds, amounting to 2,190*l.* in nominal amount. Such was the result of the examination which took place while all the parties were alive, and when it would have been competent to *Morgan* to examine Sir *Watkin Lewes*. Experience therefore proves the justice and expediency of the principle laid down. How could the Master avoid applying it to the account before him. Can it be contended that the securities under seal, which were invalid on behalf of the innocent and meritorious assignees of *John Morgan*, in the hands of their trustees, because of the original vice and infirmity of their constitution, derived from their parent *John Morgan*, are to be valid and effectual in favour of *John Morgan* himself. It is impossible.

I should not do justice to *Morgan's* case, if I did not mention another document relied on by the present exceptant as to the point in question. It is an affidavit made by *John Morgan* on the 12th *February*, 1819, whilst the last appeal was depending in the House of Lords. Sir *W. Lewes* seems to have been in gaol before the year 1816, at whose suit I do not know. In that year, and previous to the fifth report, which was made in 1817, *Morgan* had exhibited interrogatories for the examination of Sir *W. Lewes*. As he could not be much worse, Sir *W. Lewes* was unwilling to answer. He was several times brought up upon *habeas corpus*, and remanded. At last, as stated in a supplemental case, laid on the part of *John Morgan* before

the House of Lords, before the last appeal, this Court, by an order dated the 13th *November*, 1818, ordered " that in case *Lewes* should make default in filing his examination to the said interrogatories by the first day of the then next *Hilary* Term, *John Morgan* was to be at liberty to make an affidavit of the several facts to which the said interrogatories were intended to apply; which affidavit the Deputy Remembrancer was to take into consideration, and proceed in the accounts and inquiries under the said decree." I presume that *Lewes* put in no examination; for *Morgan* made an affidavit on the 12th *February*, 1819. In that affidavit, he speaks, among other subjects, to the advances which were alleged to constitute the consideration of the bonds; and in general he speaks positively, though sometimes only to the best of his recollection. The question for my consideration is, whether this affidavit, made under the circumstances stated, is sufficient evidence of these advances. This is a very unusual order, and not the common mode by which a contempt is punished. There may have been similar instances, but they are not within my experience. The Court gives authority to the Deputy Remembrancer to take *Morgan's* affidavit into consideration, but does not prescribe to him any rule respecting the weight that is to be given to it. I must presume that it left him to exercise a sound discretion according to the subject to which it was applied. If it had been intended that it should be received as conclusive evidence, the order would have said so. Without discussing what weight it ought to receive when applied to subjects untouched by any previous proceedings, I am of opinion that the Master has done right in giving it no weight whatever upon the subject, for which it is now sought to be used. It will be recollected, that so long ago as *June*, 1807, the House of Lords directed the Deputy Remembrancer to inquire into the very subject now under review. The order is expressed in these words, " That it be referred back to the Deputy Remembrancer to review his report, and in-

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quire and certify what sums were advanced by *Morgan* to *Lewes* as the consideration of the bonds alleged to have been consolidated by the bond of the 28th *February*, 1775, for 2,400*l.*, and when such sums were paid, and by whom, and to whom and in what manner. This, as I have stated, was in 1807.

I will not detail the long proceedings that took place in pursuance of this order. It is obvious that at that time this subject underwent the fullest investigation. The parties were alive, the subject familiar to their minds: it would have been competent for *Morgan* to examine Sir *W. Lewes* upon interrogatories, or to have verified the loss of vouchers by his own affidavit; yet the controversy ended, as to this matter, by the Deputy Remembrancer, on the 25th *June*, 1811, certifying by his fourth separate report, that though he found that the several sums mentioned in the second schedule to his former report, amounting to 1,141*l.* 16*s.*, were advanced by the defendant to the plaintiff, yet he did not find that any of the sums were advanced as the particular consideration for any of the bonds in his report mentioned, no evidence of that fact having been produced before him, and none of the said bonds corresponding with the sums for which such bonds were given, and none of the said advances appearing to have been made at the respective times such bonds bore date, excepting in one instance, where a sum of 25*l.* appeared to have been advanced on the 18th *November*, 1794, on which day the bond for 750*l.* bore date(a).

I cannot find that any thing afterwards done materially affects this report, which seems to me to have decided a great deal of the question between the parties. It is no where suggested that one shilling was advanced at that period, except what was asserted to have constituted the consideration of the bonds. There is one of

(a) See this report at length, 5 Price, 110.

the consolidated bonds, however, or rather the sums supposed to have been the consideration for it, which is not concluded by this finding of *June*, 1811. It relates to the first bond, which was for the sum of 500*l.* and given to *Chardin Morgan*. The Deputy Remembrancer having inquired into the consideration of this bond, in pursuance of the order of the House of Lords, of *April*, 1807, certified in his second report, that 500*l.* was advanced for it by *John Morgan*, or through his hands, on the 1st of *January*, 1774. In his third report, he stated it to be advanced by *Chardin Morgan*. In his fourth report, he certified it to have been advanced by *John Morgan*, out of his own proper money, in bank notes, and paid into the hands of Sir *Watkin Lewes*. And in his fifth report, 1817, he certified that no evidence whatever had been produced before him of the actual advance of 500*l.* as the consideration of the bond, dated the 31st of *January*, 1774. And here this inquiry ends.

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It is marvellous, in this long protracted contest respecting this sum, from 1807 to 1817, while the parties were still living, that, if there existed any evidence, it was not produced, or that it did not occur to Mr. *Morgan*, at that time, to exhibit his interrogatories for the examination of Sir *Watkin Lewes*. It is also surprising that the Deputy Remembrancer did not report, as he did on the subject of the other bonds, that certain sums of money were advanced, though not as the consideration of the bonds, if, in truth, it had appeared distinctly that any thing was advanced. This is the statement of what has passed upon this subject. *Morgan's* representatives desire now to establish the fact of the advances upon these bonds, by the affidavit of *Morgan* himself. Whatever the Master might have done respecting advances which had not been the subject of previous investigation and decision, shall he, deciding upon the credit and weight due to this affidavit, permit it to control what, after the discussion of many years, was done by his predecessor; or, shall it be

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On the re-hearing, it has been argued with great ability. The argument has not altered my opinion. I thought then, and I think now, that if *Brickdales* themselves had no right to retain these parchments against *Esdaile*, *Oxenham* can have none. His rights are derived from *Brickdales*. The new arguments which have been furnished to me, have been chiefly directed to *Brickdales'* right to the possession of those documents; to place that claim in a greater variety of lights, and to support it by more analogies. It rests principally upon the acknowledged right of a vendor to a lien upon the lands, and therefore upon the deeds, until the money be paid to him. I think that principle has no application to the present case, in which the contract has gone off by the default of the vendor; and that, if there exists any thing which may be called a lien upon these instruments, it is vested in the purchaser, as a security for the money which he has paid. I continue to think that the Court of *King's Bench* decided rightly, and that it is enough for me that they have so decided.

I do not feel that the suggestion of an understanding between *Fortescue* and *Esdaile* raises any equity, which authorizes this Court to interpose.

May 11, 21.

WILLIS v. FARRER and Others.

New trial of an issue directed in a tithe suit, it appearing that the verdict had been obtained by surprise, and against the opinion of the learned Judge who tried it, the verdict being also contrary to the opinion of the Equity Judge.

THE issue directed in this cause was tried at the *Spring Assizes* for *York*, in 1829, before Mr. Justice *Bayley* and a special Jury.

The evidence on the part of the plaintiff, in addition to the evidence in the suit in equity, consisted of a commission, issued in 1716 by the then Archbishop of *York*, for inquiring into the rights of the vicar, and the return to it: in which return the vicar was stated to be entitled to "all small tithes throughout the whole parish, except *Kirby*."

It appeared that *Lawson*, one of the persons signing the terriers of 1716, was a person examined under this commission.

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The evidence of the defendants consisted of the terriers produced by them in Equity, and of a great deal of parol testimony, that the *1l. 17s. 9d.* was paid to the rector for agistment, hay, and *grassing*, and that no agistment tithe had ever been claimed or paid by or to the vicar, in *Kirby, Broughton, or Dromonby*.

The Jury found a verdict for the plaintiff.

Mr. *Brougham*, for the defendant, on the 11th *May*, obtained a rule to shew cause why a new trial should not be granted of the issue, on the grounds that the verdict was contrary to the evidence, and given through mistake and surprise, and against the opinion of the learned Judge, who, on the trial, had gone through the evidence of the plaintiff, and some part of the evidence of the defendant, and was making an observation in favour of the defendant, when the Jury interrupted him, saying they were quite satisfied; and the Judge thereupon stopped, and the Jury found immediately a verdict for the plaintiff.

Mr. *John Williams*, Mr. *Boteler*, Mr. *Alderson*, and Mr. *Cresswell*, now shewed cause.—It does not appear from the Judge's report, that there was any miscarriage in point of law (a). With respect to the evidence, the first terrier produced by the defendants, in which the word "*grassing*" was introduced, was dated in the year 1749, and was not signed by the vicar; and the word "*grassing*" appeared to have been written on an

(a) It appeared, however, from the learned Judge's report, that he was not satisfied with the verdict, for, at the foot of his report was the

following remark: "There being no evidence of agistment tithe paid, notwithstanding the terriers, I think the verdict was wrong."

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erasure. A terrier of 1789 was also produced by the defendant, which appeared to be signed by *Ellis* the vicar, then of the age of eighty-six years, and who had previously signed five terriers without that word. It was evident to the Jury, that undue advantage must have been taken of his great age. The defendants also produced a terrier of 1809, signed by vicar *Greenside*. It appeared from the evidence that a family of that name were the principal land-owners in the parish, and that the vicar was some relation; and it was therefore for the consideration of the Jury, whether the vicar had not sacrificed the tithes for the benefit of his landed property. The learned Judge, in summing up, left it to the Jury to consider whether grassing might not be included under the term hay. It has been said by Sir *William Grant*, that, if the case is to be sent to a Jury until the verdict shall be in accordance with the opinion of the Equity Judge, there can be no use in ever directing an issue. Nothing is more common than to find a rector entitled to wool and lamb, and the vicar to all other small tithes. The doubt expressed by the learned Judge is at variance with the decree, and would appear to have arisen from the difference between a rector and vicar, and a vicar and his parishioners, not being sufficiently attended to.

Mr. *Brougham*, Mr. *F. Pollock*, and Mr. *Simpkinson*, in support of the rule.—There is no instance of an application for a new trial being refused, where the verdict appears to have been against the opinion of the learned Judge, unless where the Court is clearly satisfied that the Jury were right and the Judge wrong. The true reading of the Ecclesiastical Survey is “*cætera*,” and not “*cæteris*.” The words “belonging to the vicar” need not have been inserted, if the vicar was entitled to all small tithes, not before mentioned in the Survey.—No reliance can be placed on the Ecclesiastical Survey. The entry, with respect to the rectory, is incorrect; hay, lamb, and

wool, in *Kirby*, clearly belong to the vicar, and it is so decreed in this cause; but no exception as to *Kirby* is found in the Ecclesiastical Survey. The reason why *Ellis* did not sign the five terriers alluded to on the other side, is explained by his having a dispute with his parishioners, which had been adjusted when he signed the sixth. The terrier, signed by *Greenside*, is also signed by both churchwardens. This is not an issue granted to the vicar as of course, but an issue directed by the Court to satisfy its own conscience. The return to the commission was made simply with a view to the augmentation of the benefice, and not for the purpose of ascertaining the rights of the rector and vicar.

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The LORD CHIEF BARON.—This is a rule to shew cause why there should not be a new trial. I directed an issue to try the vicar's claim to the tithe of agistment of four townships, in the parish of *Kirby*. They are called *Dromonby Major* and *Minor*, and *Great* and *Little Broughton*. There was another township within the parish, called *Kirby*, of which I decreed to the vicar the tithe of agistment, at the hearing in equity. Upon the trial of the issue, the vicar obtained a verdict, against the opinion of the Judge. I am of the same opinion with the Judge. The endowment upon which the vicar's claim must be founded is lost. He must supply the loss by such evidence as will warrant our presuming that the lost evidence contained words conferring upon him the tithe in question. The usual evidence upon such an occasion is, to shew the actual receipt of the small tithe. Such evidence is totally wanting in this case. No such tithe appears ever to have been rendered to any body. The absence of this evidence is supplied here, as it is contended, by documentary evidence. The evidence for the vicar consists only of two documents and certain terriers. As to actual perception, there is not the slightest evidence that the vicar ever re-

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ceived it. It is the just inference from the whole case, that, shortly previous to the year 1749, he made a claim for it; that this claim was immediately opposed, on the same ground on which the parishioners now stand; that it was sometimes formally relinquished by the vicars, and, until this suit, never persisted in. What collateral evidence is sufficiently powerful to overturn an immemorial usage, and, after this dispute has actually arisen, an acquiescence of seventy years, attended occasionally by a formal acknowledgment, for so I view the vicar's signatures to the defendants' terriers?

Both the documents, the Ecclesiastical Survey, and the return to the Archbishop's commission in 1716, are open to the criticisms that have been made on them: viz. the first, that it is expressed equivocally, and may mean that the vicar's emoluments arose from such of the small tithes as he was entitled to; the other, that there is upon the face of it a gross inaccuracy, in ascribing to the vicar all the small tithes of the parish. They had both of them the pecuniary amount of the emoluments. The sources from which they arose were but a secondary consideration. The object was answered, by stating that the amounts, which they verified, were produced by small tithes arising within the parish. Usage, the great expounder of ancient instruments, negatives what the expression naturally imports. The Survey ascribes to the rector, the tithes of hay, lamb, and wool, through the whole parish, and makes no exception of the township of *Kirby*: a statement avowedly false in a most important point. As to the certificate, if it meant to represent that all small tithes, throughout the parish, were received by the vicar, that was unquestionably a mistake, for wool and lamb are received by the rector. If it meant, as is contended by the vicar, all the small tithes except wool and lamb, still it is inaccurate, for the vicar is entitled to the tithe of wool and lamb in other districts, if the occupier inhabit within

the township of *Kirby*. So that, understand it how you please, there is no precision in the statement. I make these observations for the purpose only of shewing how little reliance is to be placed on these old documents, when they are speaking of what was, to the framers of them, an inferior object, and are not speaking of the amount of the receipt; and how greatly that reliance is diminished, when you find it contradicted by the usage; no agistment whatever having been paid to him, as is confessed. It is said that agistment is a new tithe, and that Chief Baron *Richards* was among the first who signed a bill for it. I am apprised that something of that sort is reported to have been said by that learned Judge in *Byam v. Booth* (a). But I confess, I do not know how it can be called a new tithe, when there is upon the rolls of Parliament a petition of the Commons, in the second year of *Henry* the Fourth, A. D. 1400, complaining that the clergy sue unjustly in the Ecclesiastical Court for the tithe of agistment; and when our books contain, in prohibition, causes upon agistment tithe, so early as Queen *Elizabeth*, expressly establishing it.

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The next evidence produced on the part of the vicar consists of terriers. In looking at each of these terriers, we should attend chiefly to two points: *First*, how far the words, describing the rights of the vicar, prove that the original endowment contained a grant of all the small tithes of the parish, with certain exceptions. *Secondly*, how far they raise a probability of what would be fatal to the vicar's claim, that the money payment for the four townships covered all the profits from grass. The earliest terrier, dated in 1685, is expressed in the terms most favourable to the vicar in both respects. It mentions the money payment to the rector, as made for the tithe of hay, and mentions the vicar as entitled to calf, and all petty tithes, throughout the parish. This is signed by the vicar and churchwardens only, and by no parishioners. The next

(a) 2 Price, 231; 3 Eagle and Younger, 716. This case was referred to as having been cited for the plaintiff on the trial of the issue.

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terrier is in 1716. In fact, there are two of the same date: one signed by the vicar, the two churchwardens, and two parishioners; the other signed by the two churchwardens, and three parishioners. The last relates only to the two *Dromonbys* and the two *Broughtons*. It is remarkable that one *William Lawson* signs both as churchwarden, and that the same person appears to have been one of the witnesses before the Archbishop's commissioners. The return to the commission is dated 1716, the same year. The terrier of 1716, signed by the vicar, is in the language of the first; the other, signed by the two churchwardens, differs much. As to the money payment to the rector, it attributes that to hay without more, but when it speaks of the vicarial emoluments, that is always accompanied by an enumeration of a species quite different from agistment; they are always things that may be taken in kind.

If we were to infer any thing from this document, as to the expressions used in the original endowment, it would be, that it did not contain a gift in general terms, so as to include a species of small tithes of a different character from those enumerated, more especially when that tithe has never been received. But, in truth, I will infer nothing from these documents of 1716, except that, at that early period, the body of the parishioners had disagreed with the incumbent respecting the ecclesiastical emoluments; and that it is possible, that when the parishioners state the vicar to be entitled to the tithe of calf and all petty tithes throughout the parish, they understood themselves to speak of the petty tithes of the species and description of the sort specified, viz. calf, which might be taken in kind, and not a tithe of a totally different character, such as agistment. It is to be observed, that, in every instance, the expression is *calf and petty tithes*. The presumption that it was so understood, grows much stronger, when we recollect that this is the only construction consistent with the immemorial and undisputed usage, no agistment having ever been paid. It may seem to contradict this

view of the subject, that I have myself decreed to the vicar the agistment of the township of *Kirby*, though he never before received it, it is true. But I decreed it to him upon authorities which I did not think myself at liberty to controvert: cases which have engrafted an exception upon the general rule, that the vicar, whose endowment is lost, must prove his title by usage. These cases have established, that evidence of the receipt of every other tithe rendered within the description of small tithes, except the one in question, shall, if that be a small tithe, prove a general gift, entitling him to it. But, in the present case, the ground on which that exception rests, is wanting, *viz.* the receipt of all other small tithes. The small tithes must have been divided and apportioned by the terms of the endowment. That is incontrovertible. We cannot, therefore, infer a gift in general terms; and consequently these cases have no application. Where this evidence is wanting, the utmost we can do for the vicar is, to consider it as a case to be decided on all its circumstances, one of the most important of which is usage; and here there is a total absence of usage in his favour. There are two other terriers, one of 1727, and one of 1743, on which no additional observation is necessary. They are in the same terms as that of 1685. We then come to the important era of 1749. There are two terriers of that year. One of them has no other signature besides those of the vicar and one churchwarden, who may be presumed to be of the vicar's nomination. The other is signed by two churchwardens and several parishioners. The first is hardly evidence in favour of the vicar, for want of signatures; and the other is evidence against him only by the signature of his own churchwarden. There seems, in the interval, to have been an appointment of churchwardens; for the names of the churchwardens affixed to the first are not to the second. The difference between the terriers is in the introduction of the word *grassing*, in addition to hay, as the consideration for the money payment to the rector:

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This word *grassing* is written upon an erasure. I do not wonder that, in able hands, and in reply, this circumstance made a strong and undue impression upon the Jury. As I have had the advantage of a rejoinder to that reply, it makes but little impression upon me. What is material is, that it is a new word, not that it is written upon an erasure. My observations upon it are, that it must have been written at the time, that is, in 1749; that the vicar, being no party, the parishioners might have framed the terriers as they judged fit, and therefore that there was no need of the falsification; that it is manifest they had previously resolved to add some word to hay, for the *grassing* is, as I understand the judge's note, written in the context, and is *not* an interlineation; and all that you can fairly infer from it is, that, intending to introduce a new word to express their meaning, they changed their mind as to the term to be used. It is clear that this term was then introduced for the first time, and the vicar is entitled to the full benefit of that fact, but to nothing more. I shall occupy no time in remarking on the remaining terriers. I will only say, that from 1749 to 1781, upon every occasion, there are two terriers, which conflict upon this point. In 1786, and again in 1809, the vicars sign the terriers of the parishioners containing the obnoxious word; and from the beginning no vicar has ever received one farthing in the name of agistment. There is a considerable body of parol testimony with respect to the understanding of the parish, as to what the money payment of the rector covered, whether hay only, or *grassing* also. It is carried back as far as can be expected, and is quite uniform. There is not one witness opposed to this testimony. It proves the understanding of the parish to have been, that it covered the *grassing* as well as the hay. Many deceased persons were proved to have so represented it. This is the whole of the evidence. I will intimate, briefly, the reason why I think this should be reconsidered. The usage is entirely against the vicar. No agistment tithe

has ever been paid to him. The circumstance which, in former cases, has supplied that deficiency, does not exist in this case, he cannot have the aid of it, he does not receive all the small tithes that have been rendered for this district: they are divided between him and the rector. The money payment to the rector, and the non-payment of agistment to any body, afford strong probability that agistment was covered by that payment. I think the learned Judge was warranted in directing the Jury to consider whether hay might not, in the early terriers, mean all the produce of grass land. In the interpretation of antient instruments, usage has frequently supported a new mode of construction. In this case, that construction is sustained, not only by the usage of payment, but by many other instruments putting that construction upon them, and by a great body of parol testimony, the reputation in the parish, and the declarations of deceased parishioners. I do not feel that the expressions in the documents are so full, clear, and unequivocal, as to authorize me to presume the endowment necessary to support the vicar's claim, in opposition to the undisputed usage; to the strong probability of the tithe being in substance rendered elsewhere; to the claim of the parish for many years; to the formal admission of that claim by two of the vicars; and to the acquiescence of all, till the present suit. I think the verdict must be set aside, being against the opinion of the learned Judge; and that it must be tried again.

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ELLIS v. SINCLAIR and Others.

May 11th.

MR. BARBER and **Mr. M'Dougall** moved to dissolve the injunction obtained in this cause.

An affidavit made by a defendant, in a suit in this Court, sworn before a magistrate in Scotland, permitted to be read.

Mr. Knight and **Mr. Blunt** opposed the motion.

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2 Brig. &c. 21st.

In the course of the application, a question arose with respect to the admissibility of affidavits, made in a cause in this Court, sworn before a Scotch magistrate.

The bill was filed by under-writers, against the owners and mortgagee of a brig, called the *George*, for a discovery, a commission to examine witnesses abroad, and for an injunction to stay proceedings at law, commenced by the defendants in equity, against the under-writers. The bill contained the usual charge, that the defendants had in their possession books, accounts, papers, &c., relating to the matters in the bill mentioned, and required the defendants to set forth a list or schedule of them.

Two of the defendants, *Robert Cochran* and *Robert Sinclair*, put in answers, containing, according to the requisition of the bill, schedules of the books, &c. in their possession.

By an order, dated 27th *June*, 1828, the defendants were directed to leave in the hands of their clerk in court, the several documents mentioned in the schedules to their answer, and admitted by them to be in their possession, except certain letter and account-books, by their answers alleged to be in daily use, and of the entries in which, relating to the matters in question, they were ordered to leave copies or extracts, such copies or extracts to be verified by the affidavit of the defendants, to be made in the cause.

The books, papers, &c., directed to be deposited, were accordingly left with the clerk in court of the defendants, as were also extracts from the letter and account-books.

The defendants being resident in *Scotland*, the extracts were verified by affidavits sworn by them before a magistrate in *Scotland*; which affidavits were also accompanied by a certificate from a notary, resident in *Scotland*, that the defendants had sworn to the truth of the affidavits before a magistrate in *Scotland*, authorized to administer oaths;

and attesting the signatures of the defendants to the affidavits, and of the magistrate to the *jurat* (a). Exch. Ch. in Eq.
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(a) The following are copies of one of the affidavits and of the certificate annexed:

Between *Ellis Ellis* and *Thomas Murdock*,—Plaintiffs;

and

John Parish Robertson, *Robert Sinclair*, *Robert Cochran*, and *William Cochran*,—Defendants.

Robert Cochran, of *Paisley*, in *Scotland*, gentleman, one of the above-named defendants, maketh oath and saith, that he, this deponent, has carefully examined all and every the cash-book, journal, ledger, and three letter-books mentioned or referred to in this deponent's answer, filed in this cause on the 30th day of *May* last, or in the schedule thereto; And that, to this deponent's knowledge or belief, there is no entry or entries contained in such cash-book, journal, ledger, and letter-books, or any of them, which relate in any manner to the matters in question in this cause, save and except the several entries, copies whereof are contained in the several papers or writings marked respectively with the letters A, B, C, and D, mentioned and referred to by this deponent's former affidavit, sworn in this cause on the 8th day of *December* last. And this deponent saith, that the said copies are full, true, and correct copies of all and every of such entry or entries.

Robert Cochran.

Sworn before me, one of his Majesty's justices of the peace for *Ren-*

frewshire, and Provost and Chief Magistrate of *Paisley*, at *Paisley*, the 20th day of *January*, 1829.

Matthew Boyd, J. P.

Provost and Chief Magistrate of *Paisley*.

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I, *William Findlay*, of the town of *Paisley*, and county of *Renfrew*, in that part of Great Britain called *Scotland*, Notary Public, duly admitted and sworn, dwelling therein, do hereby certify and make known to all whom these presents shall and may concern, that *Robert Cochran*, of *Paisley*, on the 20th day of *January*, 1829, was sworn in my presence to the truth of the foregoing affidavit, by and before *Matthew Boyd* of *Paisley*, the Provost and Chief Magistrate of the said town of *Paisley*, and one of his Majesty's justices of the peace for the said county of *Renfrew*: And I do further certify, that the said *Matthew Boyd* is Provost of the said town of *Paisley*, and a justice of the peace for the said county, and as such is in use to administer oaths: And that the name "*Matthew Boyd*, J. P." as jurat, and the name "*R. Cochran*," subscribed to the said affidavit, are of the respective proper hands-writing of the said *Robert Cochran* and *Matthew Boyd*, and were respectively signed by them in my presence.

In witness whereof I have hereunto set my hand and seal at *Paisley*, the 20th day of *January*, in the year of our Lord, 1829.

William Findlay, N. P.

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An affidavit was also made by a person resident in *London*, who deposed to his knowledge of the Scotch magistrate, and identified his hand-writing, and stated that he was competent by the law of *Scotland* to take affidavits (a).

For the plaintiffs it was objected, that the affidavit ought to have been sworn before a commissioner of this Court, and could not be received. And for this were cited 1 *Fowl. Exch. Pract.* 337; and *Hyde v. Wakefield* (b).

For the reception of the affidavit it was contended, that, in *Hyde v. Wakefield*, the Court did not act on the affidavit, but decided merely on the ground that one foreigner could not obtain a writ of *ne exeat regno* against another foreigner. And a case of *Pinkerton v. The Barnsley Canal Company*, in the Court of *Chancery*, was referred to; in which Master *Stratford*, having declined to receive an affidavit sworn before a *Scotch* magistrate, an order was

(a) This affidavit was in the following terms:

In the *Exchequer*.

Between *Ellis Ellis* and *Thomas Murdock*,—Plaintiffs;

and

John Parish Robertson, Robert Sinclair, Robert Cochran, and *William Cochran*,—Defendants.

William Tait, of No. 66, *Cheapside*, in the city of *London*, merchant, maketh oath and saith, that he knows and is well acquainted with *Matthew Boyd*, Provost and Chief Magistrate of *Paisley*, in *Scotland*; and that he also knows and is well acquainted with the hand-writing of the said *Matthew Boyd*. And this deponent saith, that the said *Matthew Boyd* is a magistrate of the town of *Paisley* aforesaid, and

competent by the law of *Scotland* to take affidavits: And this deponent saith, that the name "*Matthew Boyd*, J. P. and Provost of *Paisley*," set or subscribed to the jurat of the affidavit of *Robert Cochran*, sworn on the 8th day of *December* last, and now produced and shewn to this deponent, and marked with the letter P, and also set and subscribed to the paper writings thereby referred to, and marked respectively with the letters A, B, C, and D, is of the proper hand-writing of the said *Matthew Boyd*.

William Tait.

Sworn in Court in *Westminster-Hall*, this 27th day of *January*, 1829. Before me,

William Alexander.

(b) 19 Ves. 334.

obtained, directing him to receive it (a). It was also stated to be the constant practice for such an affidavit to be sent

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(a) The following is a copy of the order made in that case:

Saturday, the 26th day of March, in the 48th year of the reign of his Majesty King George the Third, 1808;

Between *John Pinkerton*—Plaintiff;
and

The Company of Proprietors of the Barnsley Canal, and others,—Defendants.

Whereas Sir *Samuel Romilly*, of counsel for the plaintiff, this day moved and offered divers reasons unto the Right Honourable the Lord High Chancellor of Great Britain, that Mr. *Stratford*, the Master, to whom this cause stands referred, may be directed to receive in evidence an affidavit of *James Hollingworth*, left in the said Master's office, in support of the plaintiff's state of facts; and that in case the Court shall be of opinion that the said affidavit cannot be read, then, that a commission may issue under the seal of this Court, to one or more commissioners, to take the affidavit of the said *James Hollingworth*, in *Scotland*; and alleged that, by the decree made on the hearing of this cause, bearing date the 4th day of *March, 1805*, it was referred to the said Master to take an account of work and labour done by the plaintiff for the defendants, the *Barnsley Canal Company*, on the said canal; and that, in prosecution of the said decree before the said Master, the plaintiffs caused a state of facts to be carried into the said Master's office; in support of which the said affidavit of the said

James Hollingworth, now resident in *Argyleshire*, in *Scotland*, was produced; and that it appears the deponent is now employed to superintend the carrying on the works of the *Crinan Canal*, now in a state of progress there; and that the said affidavit appears to be sworn before *Archibald Bell*, one of the magistrates and justices of the peace at *Inverary*. And accompanying the said affidavit, there is carried into the said Master's office, another affidavit (sworn before the said Master), made by Mr. *Thomas*, one of the solicitors of this Court, stating that he is acquainted with the hand-writing of the said *Archibald Bell*, and proving his signature to the jurat of the said *James Hollingworth's* affidavit, and to the accounts and exhibits referred to in that affidavit. That the said Master, on being attended on the said state of facts, refused to admit the said *James Hollingworth's* affidavit to be read in support thereof, because it appeared that the person making the affidavit resided, and that the affidavit itself was made, out of the jurisdiction of this Court; and because it appeared to be made before a person who had no authority from this Court to take such an affidavit. In the presence of Mr. *Spranger*, of counsel for the defendants. Whereupon, and upon hearing what was alleged by the counsel for the said plaintiff, and for the defendants, his Lordship doth order, that, upon its being verified to the satisfaction of the said Master, Mr. *Stratford*, that the person be-

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from *Scotland* for the purpose of holding to bail a party resident in *England*, and for a Judge, on production of such an affidavit, to make an order for the issuing of bailable process.

The LORD CHIEF BARON over-ruled the objection, and allowed the affidavit to be read.

fore whom the affidavit purports to be made, is, according to the law of *Scotland*, qualified to administer an oath; and upon the signature of such person to the jurat of the said affida-

vit being verified, the said Master be at liberty to receive the said affidavit of the said *James Hollingworth*.

May 29th,
June 4th, 5th.

A testator by will specifically devises an estate to his wife; and, after certain bequests, he gave and devised to her all other his freehold, copyhold, and leasehold estates, not thereinbefore otherwise disposed of. By a codicil, after reciting the devise to his wife, he, in case his wife should die before him, devised all his said estates to trustees upon certain trusts:—
Held, that the will was not republished by the codicil, so as to pass estates purchased between the date of the will and the codicil.

SMITH and Another v. DEARMER and Others.

THOMAS DEARMER, being seised of freehold and copyhold estates, and entitled to personal property, made his will, dated 3rd *April*, 1811, duly executed and attested to pass freehold estates by devise; and thereby empowered and directed the plaintiffs, their heirs and assigns, to sell and convey his copyhold estates therein mentioned, and to stand possessed of the purchase-mones, upon the trusts therein mentioned. And he gave and devised to his wife, *Elizabeth Dearmer*, (who died in his lifetime), her heirs and assigns, all his messuages in *Bucklersbury*, in *Hitchin*, therein described, subject to the several weekly payments thereout, therein mentioned, to the testator's brother and sister, *William Dearmer* and *Ann Howard*, (who died in the testator's life-time); and after the decease of his brother and sister, to the payment of 50*l.* each to his nephew *John Osman*, and his niece *Mary Foster*. The will then contained a devise in the following words: "Also I give and devise to my said wife, *Elizabeth Dearmer*, her

An heir-at-law, questioning the sanity of his ancestor, is entitled to an issue *devisavit vel non*, and, if he fails in the issue, will not be compelled to pay costs, if the circumstances justified him in trying the issue; but costs will not be allowed to him.

heirs, executors, administrators, and assigns, all my other freehold, copyhold, and leasehold messuages, lands, hereditaments, real estate, and real chattels, whatsoever and wheresoever, not hereinbefore otherwise disposed of."

And the testator, after bequeathing certain pecuniary legacies, bequeathed the residue of his personal estate to his wife, and appointed her and the plaintiffs executors of his will.

The testator made a codicil to his will, dated the 17th March, 1827, also executed and attested so as to pass real estates; which codicil was partly in the words following: "Whereas I have in and by my will given to my wife *Elizabeth Dearmer*, her heirs and assigns, all my messuages or tenements in *Bucklersbury*, in *Hitchin* aforesaid, in the occupation of myself and others, with the yards, corn-shops, out-houses, and appurtenances thereto belonging, charged with a weekly payment to my brother *William Dearmer*, and my sister *Ann Howard*, both of whom are dead; and further charged, after their decease, with the payment of the sum of 50*l.* a-piece, to my nephew *John Osman*, and my niece *Mary Foster*: And whereas I have also given and devised to my said wife, and her heirs, executors, administrators, and assigns, all other my freehold, copyhold, and leasehold messuages, lands, tenements, hereditaments, and real estate, not in my said will otherwise disposed of: Now, therefore, if my said wife, *Elizabeth Dearmer*, shall depart this life before me, I do hereby give and devise to my friends *Samuel Smith* and *John Crawley*, in my said will named, and the survivor of them, his heirs and assigns, charged as aforesaid, all my said messuages, lands, tenements, hereditaments, and real estate, so given and devised to my said wife as aforesaid, upon trust for sale as therein mentioned. And whereas I have by my said will given all my personal estate and effects to my said wife, now I do hereby give the same, in case she shall depart this life before me, and also all other money, benefit, and advantage, which would arise or accrue to her, my said wife, under or by virtue of my said will, unto

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the said *Samuel Smith* and *John Crawley*, their executors, and administrators, upon trust that they, and the survivor of them, his executors and administrators, do and shall convert all my said personal estate and effects into ready money. And I direct that the net money to arise from the sale of my said real and personal estates, shall, subject to the direction or qualification hereinafter mentioned, and after payment thereof of all my just debts, and my funeral and testamentary expenses, and the legacies, as well given by my said will as those hereinafter mentioned, be paid and divided unto and equally between all the brothers and sisters of my said wife, who shall be living at my decease, and the issue of such of them as shall be dead leaving issue, such issue to take in equal proportions, if more than one, the parent's share; and the interests and profits of the share or shares of such issue, if they shall be minors, shall be applied, during their minority, for their support and benefit. Nevertheless, I direct that the shares of two of the sisters of my said wife, namely, *Ruth*, the wife of *Thomas Tanner*, and *Alice*, the wife of *Jackson Smith*, shall not be paid and payable to them, but shall be vested in my said trustees, upon trust that they, and the survivor of them, his executors and administrators, do and shall, from time to time, pay and apply the dividends and interest of such shares, unto the said *Ruth Tanner* and *Alice Smith*, during their respective natural lives; and their receipts alone, notwithstanding their coverture, shall be sufficient discharges to my said trustees for the same, which shall not be liable to the debts, control, or engagements of their respective husbands. And after the respective deceases of the said *Ruth Tanner* and *Alice Smith*, then I direct that their respective shares shall be paid and payable to their respective issue, in equal proportions, if more than one: and if either of them shall depart this life without leaving issue, then I direct that the share or shares of her or them so dying, shall be paid unto and equally divided between the surviving brothers and sisters of my

said wife. Also I give to my niece *Sarah Dearmer*, the legacy of 200*l.* in addition to the 200*l.* to which she will be entitled under my will, to be paid her within six months next after my said wife's decease. Also I give to *William Rogers*, son of *William Rogers*, of *Hitchin*, Ironmonger, the legacy of 50*l.*, to be paid him on his attaining the age of twenty-one years, and the interest thereof to be applied for his benefit during his minority."

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The bill was filed by *Smith* and *Crawley*, the devisees in trust and executors, against *Sarah Dearmer*, the niece and heiress-at-law of the testator, and against the several persons beneficially interested under the will and codicil, in the testator's real estates, and prayed the establishment of the will and codicil, and that the usual accounts might be taken of the testator's real and personal estates.

The defendant, *Sarah Dearmer*, the heiress-at-law, admitted the validity of the will, but disputed the codicil, on the alleged grounds of the testator's insanity at the time of making it, and of undue influence practised on him; and, in support of such allegations, stated the confinement of the testator at various periods, in different lunatic asylums; and particularly that he was in a lunatic asylum at *Bedford*, from the year 1826, until about the 8th *March*, 1827, on which day one of the parties beneficially interested under the codicil, took him away, and conveyed him to *Law Hall*, near to *Hitchin*, where he remained until the 22nd of the same month, when he was removed by such person to *Hitchin*, and from thence to *Shefford*, where, on the 28th of *May*, he committed suicide; and, by a coroner's inquest, he was found to have destroyed himself when a lunatic.

The plaintiffs examined witnesses to prove the due execution of the will and codicil, and the testator's sanity; and such witnesses were cross-examined by the heiress-at-law. At the hearing of the cause the Court, at the instance of the defendant *Sarah Dearmer*, directed an issue, *devisavit vel non*, and decreed the usual accounts.

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The issue was tried before the Lord Chief Baron, and a special Jury, at the *Spring Assizes* at *Hertford*, 1829. The trial lasted a considerable time, and the evidence of the testator's sanity was most contradictory; but ultimately the Jury found a verdict for the plaintiffs, thereby establishing the will and codicil.

The cause now came on to be further heard on the *postea*. The important points for discussion were, whether the codicil was a republication of the will, so as to pass estates purchased by the testator between the date of his will, and the date of his codicil; and by whom the costs of the issue should be paid.

Mr. *Treslove*, and Mr. *Simpkinson*, for the plaintiffs.—Whatever were formerly the rules on the subject, it is now settled that it is not necessary that a codicil should be annexed to the will; it will be sufficient if the codicil refer to it. In *Acherley v. Vernon* (a), it was held that a devise to trustees, which trustees were afterwards changed by a codicil, was not revoked by the codicil: and that a codicil attested by three witnesses, and ratifying a will, amounted to a republication of that will; and that both ought to be taken together as one will. In *Barnes v. Crowe* (b), which was a much stronger case than the present, lands purchased after a general devise were held to pass by it, the will being held to be republished by a codicil relating to personalty only, that codicil being attested by three witnesses, and referring to the will, and being directed to be taken as part of it. In the Countess of *Strathmore v. Bowes* (c), the testator devised all his freehold and copyhold lands, in trust for the benefit of his children; he afterwards purchased other lands, and ten years after the date of his will made a codicil, whereby, after reciting

(a) 3 Bro. P. C. Toml. edit. 85.

(b) 1 Ves. jun. 486.

(c) 7 T. R. 482; 2 Bos. & Pull. 500.

that he had devised all his freehold and copyhold lands to the trustees named in his will, he revoked the same, so far as related to two of the trustees, and devised his *said* lands to the other trustees, upon the same trusts, and concluded with declaring the codicil to be part of his will. The heir-at-law claimed to be entitled to the lands purchased between the date of the will and the codicil. The case was argued in the Court of *King's Bench*, and the decision was in favour of the heir; and that decision was ultimately affirmed in the House of Lords. That case is, however, clearly distinguishable from the present; and the judgment proceeded on the ground of there being words of exclusion, the codicil itself furnishing evidence that the after-purchased estates were not intended to pass: the testator revoked the devise of the estates devised by his will to two of his trustees, and then devised his *said* estates to the other trustees, the word *said* having necessarily reference to the estates devised by his will. In the present case, it is clear, on the face of the codicil, that the testator did not mean to die intestate as to any part of his estate; for the codicil is expressly stated to be made with a view to prevent it. He declares, on the 17th *March*, 1827, that he had devised not only his lands in *Bucklersbury*, but all other his lands, to his wife. With respect to costs, it is a settled rule, that where the heir-at-law sets up insanity in the testator, and fails in the proof of it, he shall not have his costs. *Berney v. Eyre* (a), *White v. Wilson* (b). It is clear, therefore, that if the defendant, *Sarah Dearmer*, is not decreed to pay any costs, she can have no costs allowed to her.

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Mr. *Ching*, for the persons beneficially interested under the codicil, relied on the same cases as were cited on the part of the plaintiffs; contending also that the rule of law would prevail against the intention; for which he cited *Rowley v. Eyton* (c); in which, as he urged, considerable vio-

(a) 3 Atk. 387.

(b) 13 Ves. 87.

(c) 2 Meriv. 128.

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lence was done to the intention of the testator, to preserve the rule of law. He did not press for costs as against the heir, but submitted that the heir was not entitled to any costs.

Mr. *Jervis* and Mr. *Randell*, for the defendant *Sarah Dearmer*, the heiress-at-law.—Admitting the general rule to be as laid down in *Acherley v. Vernon*, and *Barnes v. Crowe*, to which may be added *Piggott v. Waller* (a), and *Goodtitle v. Meredyth* (b); still, they will not govern the present case, which must be decided on its own peculiar circumstances. In *Hulme v. Heygate* (c), the Master of the Rolls observes, “ I formerly had occasion to consider this doctrine very much at large in the case of *Piggott v. Waller*, where I observed that the old cases, deciding against the constructive republication of a will, appear to me more conformable to the statute of frauds than those of later date; but I, nevertheless, held it to be a point now clearly established as a general rule, that a codicil, duly attested, does amount to such republication.” This is a point not controverted in *Lady Strathmore v. Bowes*, and was fully recognized in the late case of *Goodtitle v. Meredyth*, by Lord *Ellenborough*, who says, that “ the effect of all the decisions is, to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless a contrary intention be shewn.” The question is, whether the will in this case is brought down to the date of the codicil. If the intention is to govern, it is clear, in this case, that the testator did not mean after-purchased lands to pass, for no words could be less calculated for the purpose. The case is much stronger than *Strathmore v. Bowes*. The testator, by the codicil, refers to the specific devise to his wife, and again to the general devise to her, which is tantamount to a local description of the pro-

(a) 7 Ves. 98.

(b) 2 Mau. & Selw. 5.

(c) 1 Meriv. 285, 293-4.

perty devised. No doubt, the codicil was made to prevent an intestacy, but only a partial intestacy, by giving to the wife's relations the property intended for her. As to costs, the heiress-at-law is unquestionably entitled to her costs. No discussion took place on the original hearing of this cause, the issue being directed as of course; the circumstances of the case justified the heiress in questioning the testator's sanity: and that the matter was doubtful, is evident from the discrepancies in the evidence of the witnesses before the Examiner in this Court, and on the trial of the issue. The opinion attributed to Lord *Hardwicke* in *Berney v. Eyre*, was clearly extra-judicial, and is decidedly at variance with the opinion expressed by him in *Webb v. Clavenden* (a). *White v. Wilson*, is merely a repetition of what was said by Lord *Hardwicke* in *Berney v. Eyre*.

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Mr. *Treslove*, in reply, contended that the codicil, being duly executed and attested, in fact formed part of the will, the will being brought down to the date of the codicil, and being republished by it.

LORD CHIEF BARON, [*after referring to, and stating at some length, the case of Acherley v. Vernon*].—The principle to be drawn from this and other cases seems to be, that, if the codicil be duly executed and attested, it brings the will down to the date of the codicil. The subject is, however, put on another principle in *Strathmore, v. Bowes* which is, I think, in all material points, the same as the present case. In *Strathmore v. Bowes* it was clearly shewn, on the face of the codicil, that the testator did not intend to revoke the general devise contained in his will, but only to change two of the trustees appointed by his will. In the present case, the testator had evidently only one object in view, which was, seeing the probability of his wife's death in his lifetime, to substitute her relations in her place, in

(a) 2 Atk. 424.

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case that event should happen. That this was manifestly his intention is clear, from the circumstance that the codicil would not have had any operation at all, if his wife had survived him.

On the authority of *Strathmore v. Bowes*, I must hold that the after-purchased lands do not pass by the codicil. I consider *Strathmore v. Bowes*, to be a case of great authority, for, independently of the talents of the persons by whom it was argued, it was before all the Judges; and Lord *Eldon*, and all the other Judges, except Lord *Thurlow*, concurred in the propriety of the decision.

With respect to the costs, I think the heiress must have all her costs in equity, on the common principle that she is merely cross-examining the witnesses, which she is entitled to do. With respect to the issue, I cannot make her pay those costs, for though, at the trial, I entertained a very clear opinion that the codicil was made in a lucid interval, still the facts of the case were such as to justify the heiress in requiring and trying the issue. There is not, therefore, the least colour for making her pay those costs; but, still I cannot throw the costs on the other side; and I shall not, therefore, give any costs as to the issue.

May 27th,
June 12th.

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The testamen-
tary guardians
of an infant sold
part of his es-
tates for the

IN the year 1800, the Rev. *Lascelles Iremonger*, and *Charles Shard*, as the guardians of the defendant *Morant*, purpose of redeeming the land-tax, under the provisions of the act 38 Geo. 3, c. 60; by which, in cases of sales of the estates of infants for the purposes of that act, it is provided, that the purchase-moneys shall be paid into the Bank of *England*, in the manner therein directed. The purchaser of part of the property paid his purchase-money to the agent of the vendors, who was also agent to the purchaser, and the conveyance was executed. The agent did not pay the money into the Bank, but mis-applied it. The purchaser entered into possession, and continued in such possession for many years, paying, however, the land-tax. The heir-at-law, upon his attaining his age of twenty-one years, settled accounts with his guardians, and afterwards continued to employ the same agent, with whom he some years afterwards settled an account; and for the balance, including the purchase-money, took from such agent a security, which, however, proved valueless. Nearly twenty years after attaining his age, the heir brought an ejectment against the purchaser; to restrain which, and to obtain a confirmation of the contract, the purchaser filed his bill. The Court dismissed the bill, but without costs.

who was then an infant, appointed by the will and codicil of his father, through their solicitors, Messrs. *Harbin & Hooper*, and in pursuance of the powers contained in the land-tax redemption act, contracted with the commissioners for the sale or redemption of the land-tax, for the redemption and purchase of the land-tax chargeable on certain lands and hereditaments, of which the defendant was seised; and in order to raise the money necessary for such purpose, the guardians, in pursuance of the powers of the act, caused parts of the said estates to be put up to sale by auction, on the 23rd *December*, 1800; and advertisements were published of such sale; which was stated, in such advertisements, to be under the authority of the commissioners for the redemption of the land-tax. Particulars and conditions of the sale were prepared by Messrs. *Harbin & Hooper*, as the solicitors of the guardians; and by such conditions, it was (*inter alia*) expressed that the purchaser should pay to Messrs. *Harbin & Hooper*, the vendors' solicitors, a deposit of 20*l. per cent.*, and that the residue of the purchase-money should be paid to the said solicitors on a day therein mentioned. And it was stated, that the said estates were sold under the authority of the commissioners for the redemption of the land-tax.

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At the sale, *Robert Hicks* became the purchaser of the premises comprised in Lot 82, at 138*l.*, and he paid to Messrs. *Harbin & Hooper*, 30*l.* as a deposit. A conveyance was afterwards prepared, and engrossed by *Harbin & Hooper*, such conveyance being dated the 1st *July*, 1803, and expressed to be made between *Iremonger* and *Shard*, of the first part; two of the commissioners appointed for the purpose of the act passed in the 38th year of King *George* the Third, and acting for the county of *Southampton*, of the second part; the said *Robert Hicks*, of the third part; and *Barnaby Hicks*, a trustee to bar dower, of the fourth part: and such conveyance was exe-

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cuted by all the said parties, except *Barnaby Hicks*; and thereby the premises comprised in Lot 82, were conveyed and assigned to *Robert Hicks* in fee; and *Hicks* paid 108*l.*, the residue of the purchase-money, to *Harbin & Hooper*, for the purpose of being paid into the Bank of *England*, according to the provisions of the act, together with the expenses of the conveyance.

About the same time, *Robert Hicks* entered into possession of the property purchased by him. And he continued in such possession until his death. He died in *April*, 1823. And the plaintiffs, as his devisees in trust and executors, after his decease, entered into possession of the said estate.

The defendant, *John Morant*, attained his age of twenty-one years, in 1807, and subsequently discovering that the purchase-money for Lot 82, had not, in compliance with the provisions of the act, been paid into the Bank of *England*, he brought an ejectment to recover possession of the property.

To restrain the ejectment, and to compel the defendant to confirm the sale, and execute a proper conveyance, the present bill was filed. And for this purpose the bill alleged that, after the defendant attained his age of twenty-one years, *Iremonger* and *Shard* rendered an account to him of their acts as guardians, trustees, and executors, and some accounts were settled between them; and that the defendant then became acquainted with the said sale, and the circumstances thereof, and with the employment of *Harbin & Hooper*, as the solicitors of the guardians; and that the defendant, on his attaining his majority, and for many years afterwards, employed *Harbin & Hooper*, as his solicitors; and that, shortly after he attained his age, he was led to believe that the purchase-mones, which had been paid by the said *Robert Hicks* to the said *Harbin & Hooper*, as the agents of the guardians, had not been paid by them into the Bank of *England*, but had either been paid or allowed in account

to the defendant, or had been retained by *Harbin & Hooper* to their own use; and that the defendant treated the monies so received by *Harbin & Hooper*, and not paid into the Bank, as a debt due to him, and did not inform the said *Robert Hicks* thereof, but, on the contrary, required *Harbin* (*Hooper* being then a bankrupt) to pay him such purchase-monies, or give him security for the same; and that, in the year 1813, he obtained from *Harbin* a mortgage security for the repayment of such monies; and that, by such security, it was stated that the sum of 466*l.* 15*s.* was due and owing from *Harbin* to the defendant, on the balance of the account of *Harbin*, relative to the purchase-monies of certain hereditaments and premises in the parish and manor of *Ringwood*, sold to various persons under the act passed for the redemption of the land-tax; and that the defendant had consented to let the same remain on the security of the hereditaments therein mentioned, or to that effect; and that such statement referred to the land and hereditaments so sold by auction; and the said 466*l.* 15*s.* included the purchase-money of the said *Robert Hicks*, or was the balance of all the purchase-monies retained; and that the said mortgage security had either been paid and satisfied, or the equity of redemption of the mortgaged premises had been conveyed to the defendant by *Harbin*, and a release of the mortgage debt had been executed by the defendant to *Harbin*; and that the defendant never made any communication, in respect of the said matters, to *Robert Hicks* in his life-time; but that *Robert Hicks*, until and at the time of his death, remained wholly ignorant of any retainer or misapplication of the purchase-monies, and relied on the vendors' agents having properly disposed of the purchase-monies. The bill also charged, that the guardians were bound by the acts of their solicitors and agents; and that the defendant had, since he attained twenty-one, in many respects confirmed the acts of his guardians.

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The defendant, by his answer, denied all personal knowledge of the transaction, but expressed his belief of the sales, for the redemption of the land-tax, having taken place, and of the conveyance of Lot 82 having been prepared and engrossed, and executed. But he believed that the conveyance, after it had been signed and sealed, remained in the hands of Messrs. *Harbin & Hooper*, undelivered, and in trust for all parties, until the purchase-money should be duly paid and applied according to the directions of the land-tax redemption act; and that, on or about the 9th *October*, 1803, *Robert Hicks* paid the purchase-money to the said Mr. *Hooper*, who was one of his own attornies, for the purpose of having the same, together with the said former sum of 30*l.*, paid into the Bank of *England*; and that, at the same time, *Robert Hicks* paid to *Hooper* 10*l.* 16*s.* 9*d.* in respect of the expenses of the conveyance. That the conveyance remained in the hands of *Harbin & Hooper*, until the dissolution of their partnership, in 1805. That *Hooper* was *Hicks*' attorney until 1811. And that, in and before the year 1824, the said conveyance was in the hands of *Harbin*; but, in the month of *August*, in that year, the plaintiffs, without the knowledge, privity, or consent of the defendant, or of the commissioners for the redemption of the land-tax, obtained the conveyance from *Harbin*. That the purchasers of all the other lots which were sold, paid their purchase-monies to *Harbin & Hooper*, or one of them, and received from them conveyances which were wholly invalid; and that the purchase-monies of some of the lots were laid out and invested in the purchase of stock, to the end that the same might be applied to the purpose for which the said sale was made; but that none of such sales was regularly or properly completed. That having discovered the irregularity and invalidity of the said sales, he had proposed, on certain terms and conditions, to confirm, and had confirmed, most of the said purchases. He admitted the settlement of his guardians' accounts on his coming of age, and his being informed of the sales, but

not of the circumstances relating thereto. He admitted his employment of *Harbin*, but not of *Hooper*, as his attorney. The defendant admitted his being given to believe, soon after he attained twenty-one, that the purchase-monies paid by *Hicks* and the other purchasers to *Harbin & Hooper* had not been paid into the Bank; but denied that he understood or believed that such monies had been paid to *Harbin & Hooper*, as the agents of the vendors, or otherwise than for the purpose of being paid into the Bank of *England*, according to the provisions of the act; and that, being interested that the same should be so paid in, he had urged the payment thereof; and that some of the purchasers, who had previously paid their purchase-monies to *Harbin & Hooper*, afterwards caused the amount thereof to be paid into the Bank of *England*; but the remaining part of such purchase monies, amounting to 466*l.* 15*s.* and including therein the 138*l.* paid by *Hicks*, was not paid into the Bank; and *Harbin* being wholly unable to pay the same, he proposed to give, and the defendant agreed to take, a further charge for the same on certain estates then already in mortgage to *Elizabeth Jones*, for securing 1300*l.* (afterwards paid off by the defendant), and in mortgage to the defendant for securing 1798*l.*; and accordingly such further charge was executed to him. That, in accepting such further charge, he did not intend to exonerate any of the parties liable to pay the said sum of 466*l.* 15*s.* That *Robert Hicks*, although he knew that the said premises were sold for the purpose of redeeming the land-tax, always paid the land-tax, during his life-time, in respect of the premises purchased by him; and he and the other purchasers knew that the purchase-monies paid by them to *Hooper* had not been paid into the Bank. That it was the duty of *Robert Hicks* to see that the purchase-money, which he had paid into the hands of his own solicitor, was paid and applied to the purpose for which the said premises were sold; and that the non-payment of the

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money into the Bank was attributable to his own *laches* and neglect. The defendant alleged that *Hicks* was perfectly conusant of the transactions.

He admitted, that, *Harbin* being insolvent, and the mortgaged premises being of less value than the two prior mortgages therein, he had accepted a release of the equity of redemption, and, in consideration thereof, had released *Harbin* from all demands. The defendant, however, offered to give the plaintiff the benefit of the further charge, on payment of the purchase-money and interest.

Mr. *Jervis* and Mr. *Tinney*, for the plaintiffs.—Supposing the contract not to have been performed in exact conformity with the provisions of the act, yet it was a good contract on the part of the guardians; and though it might have been repudiated by the defendant, when he came of age, still he has, by his subsequent conduct for nearly twenty years after that event, not only acquiesced in, but adopted and confirmed the contract, and has, by his conduct, prevented *Hicks* and the plaintiff from recovering back the money from *Harbin & Hooper*. *Waring v. Ward* (a) was cited for the plaintiffs.

Mr. *Treslove* and Mr. *Jacob*, for the defendant.—The 96th section of the act renders the contract wholly void, in case all the directions of the act are not strictly complied with(b). It cannot be disputed that those provisions have

(a) 7 Ves. 332.

(b) By the 96th section it is enacted, that, “if any person or persons, after entering into any such contract as aforesaid, for the redemption or purchase of any such land-tax, shall afterwards refuse or neglect to complete the same by the due and regular transfer of the several instalments agreed to be made thereon, then, and upon every such case, and immediately after default

shall be made in the transfer of any of the said instalments, such contract shall become null and void, and the whole of the land-tax so contracted for (in case the same shall have ceased by virtue of this act) shall be revived, and again become chargeable on the manors, messuages, lands, tenements, and hereditaments, whereon the same was charged prior to such contract; and such land-tax (whether the

not been complied with, and that the legal estate has not passed, there being no receipt for the purchase-money from the cashier of the Bank of *England*. The guardians had clearly no authority to sell for the redemption of the land-tax, and could not redeem in any other manner than that prescribed by the act. *Harbin & Hooper* were debtors to *Hicks*, and not to the defendant; and the security taken by the defendant was for *Hicks*' benefit, and could not extend to discharge *Hicks*, or amount to a new contract for the sale of the estate; nor can the defendant, by his conduct, be treated as having elected to take *Harbin* for his debtor, and discharge *Hicks* or his estate. The guardians having no power to contract except according to the provisions of the act, and those provisions not having been complied with, and the defendant himself being no party to any contract, there is no contract within the statute of frauds. *Dillon v. Parker* (a), *Devaynes v. Noble* (b), *Hardwicke v. Mynde* (c), *David v. Ellis* (d), and *Adams v. Clifton* (e), were cited on the part of the defendant.

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LORD CHIEF BARON. — The relief sought by the plaintiffs in this suit is twofold: *First*, a conveyance from the defendant *Morant*, of the estate in question; and, *secondly*, if the Court should think he is not compellable to execute such conveyance, to have the purchase-money

same shall have been redeemed or purchased) shall be again assessed, raised, levied, and collected for the use of his majesty, his heirs and successors, or be again sold by the commissioners specially appointed for the purposes of this act, in the same manner as if such contract had not been entered into; and the person or persons so making default shall, for the non-performance

of such contract, be subject to a penalty not exceeding the amount of the value of the stock agreed to be transferred for the first instalment."

(a) 1 Swanst. 377, 381.

(b) 1 Merivale, 610, 624.

(c) 1 Anstr. 110.

(d) 7 Dowl. & R. 690; 1 Carr. & P. 368; 5 Barnew. & C. 196.

(e) 1 Russel, 297.

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paid, or supposed to have been paid, on the purchase of this estate, to *Harbin & Hooper*, and interest, repaid to the plaintiffs. I presume that those who represent Mr. *Hicks*, admit, that if interest is to be allowed on the one side, rent must be accounted for on the other, or at least that the one must be set off against the other. The question I have to dispose of is, whether the plaintiffs are entitled to any part of the relief sought by them.

The first part of the relief I should think I hardly had a right to grant, unless the plaintiffs had been able to make out a case of fraud, or, if I may use the expression, a case nearly amounting to a fraud; because it is admitted in the argument that Mr. *Morant* has a clear legal right to the possession of this estate. It is, however, contended, that there are equitable circumstances which ought to induce the Court to interpose against that clear legal right, and to say, that, in equity, he is bound to abandon that legal right, and to make a valid conveyance of this estate to Mr. *Hicks*, in the teeth of his own legal right. Now, the circumstances which are supposed to entitle Mr. *Hicks* to that relief, are great delay and negligence on the part of Mr. *Morant*. The impression which the argument and the facts of the case have made upon my mind, is, that there has been a great deal of very gross negligence on both sides; but if there be any side on which that negligence preponderates, it is on the side of Mr. *Hicks*. Mr. *Hicks* bought this land of the testamentary guardians of Mr. *Morant*, and not of Mr. *Morant* himself. He bought it under the authority of the act of Parliament. He knew, for whether he did in fact know it or not, I must take him to have known it, that the persons of whom he was purchasing were exercising a power; and that he could have no title to this estate, unless the sum of money for which it was bought was actually paid into the Bank of *England*, to the public use. He also knew from the beginning that this

was not done. I may infer this, I think irresistibly, from the circumstance, that, during the whole of his life, he continued to hold the estate without any title whatever; no instrument of conveyance being ever delivered to him, or to any person, that I can find, for his benefit. It was in the hands of those persons who, I think, in the argument, the counsel for Mr. *Morant* admitted very properly were the agents for the testamentary guardians. Besides, I must take him to have known as a fact, that, if this purchase had been completed in the way required by law, he never would have had to pay any land-tax for an estate so bought; for it is recited in the very deed executed by himself, that it was discharged from the land-tax. I therefore take it to be clear, that, from the time he entered into this estate in 1803 down to his death, he knew perfectly well that he was holding this estate as the mere tenant at will of the persons who were the legal holders of it, the conveyance, under which he claimed, never being executed; and therefore that he was liable to be turned out at any moment. Well, then, under these circumstances he continues to hold the estate, and never during the whole of that time was any thing said about the conveyance, till an application was made by the solicitor in the present suit, I believe. *Hicks* continues to hold this estate, and to pay the land-tax, without ever inquiring whether the proper steps had been taken to give him a title to this estate, and without ever calling for that title from any one. Now, I take it for granted, I think I am bound to do so, that Messrs. *Harbin & Hooper*, the persons to whom this money was paid or supposed to be paid, were the agents of the vendors. I think Mr. *Hicks* is entitled to all the benefit arising from that fact. *Harbin & Hooper* were the agents of the vendors, who charged them, as indebted to them for the purchase-money, the sum of 138*l.*, which could only have been upon the footing of their being the agents of the

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vendors upon that transaction; because, otherwise, if they had paid any thing, the vendors would have been indebted to him. That is not the way in which it is stated, but the vendors charge them with 138*l.*; and, therefore, upon the evidence in the case, I think Mr. *Hicks* is clearly entitled to the benefit of that fact, whatever that benefit may be. Now, taking as a clear fact, that he is entitled to consider these persons as the agents of the vendors, who were the vendors? The vendor was not Mr. *Morant*, but they were persons under the act of Parliament exercising the power of testamentary guardians; and if the transaction had remained unfinished and unsettled, as in fact it did, at the time Mr. *Morant* came of age, I do not know that there is any power in the country that could have compelled him to complete it. He might have said, "I will not sell it," or "I will keep it for myself;" and therefore it seems to me to be a clear proposition, that the resource or remedy which Mr. *Hicks* would have had, would have been against *Harbin & Hooper*, as the possessors of this money, or against those persons as whose agents they had at that time received it, that is, against Mr. *Iremonger* and Mr. *Shard*. His remedy, therefore, was against them, and that remedy he never thought fit to seek; so that he remains all this time in possession, without title, acting in such a way as to shew that he knew his title was not complete: he made no demand, it appears, of any kind whatever, and in that situation he left Mr. *Morant*. I do not say Mr. *Morant* was not guilty of *laches*, I think he was; but the question is, whether it was so gross on one side as to counter-balance it on the other, and to entitle this Court to take from Mr. *Morant* the estate for which, in point of fact, he has never received the money? Now, it appears that Mr. *Morant* certainly had sufficient notice, very soon after he came of age, of sales, and that this sale had not been carried into execution; and that he never took those steps

which I think he ought to have taken: but, I think, on the other hand, Mr. *Hicks* ought, upon Mr. *Morant's* coming of age, to have gone to him and said: "Sir, there is this estate which has not been properly conveyed to me, now I insist upon your conveying it to me, I will take care the money shall be paid to you, but the estate must be mine." Instead of that, he remains quiescent for many years afterwards, as did also Mr. *Morant*; the latter, however, took a step which has raised the great doubt in my mind upon this subject; that is, he treated *Harbin* as his debtor for this sum of money, and took a security from him; and though it was a fruitless one, in consequence of the small value of the estate he took as a security, still he treated it as his demand. Undoubtedly he treated it as his demand, but I do not think that this was doing any injury to Mr. *Hicks*. It was in fact an advantage to him, as he was remaining in possession of the estate. If the effect of that had been as is contended, and that he had released any person as against Mr. *Hicks* by that act, then I should have thought that a case approaching to fraud would have arisen, and, perhaps, there might have been a strong ground either for the one relief or the other; but, in the view that I take of it, there was nothing which Mr. *Morant* could have done, except by actually receiving the money and making himself by that receipt answerable, which could have discharged *Hicks*, however it might have released *Harbin*, or the executors of his father, the testamentary guardians, against whom I think the legal demand of Mr. *Hicks* was, because it was in a transaction with them, he had bought of them, he had paid the money to their agents, and, paying the money to their agents, they would have been answerable to him; and it is against them, or their representatives, as it seems to me, if there is any equity in this case, that the equity ought to be enforced. That is the

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impression I have upon this case, and I do not think the claim of Mr. *Morant*, treating it as his money, binds Mr. *Hicks*, either not to claim that money of *Harbin & Hooper*, or not to claim it of *Iremonger* and *Shard*, if they were at this moment forthcoming.

Upon these grounds, I think I am not entitled to make this decree, either in the one aspect or the other; because I think that Mr. *Hicks' laches* was extreme in permitting matters to remain in their present situation. Though he had the possession of the estate, he knew very well under what circumstances. And as Mr. *Morant* is not barred by time, I am unacquainted, according to my present opinion, with any equity that can prevent him from taking it. The transaction between Mr. *Morant* and *Harbin* principally raises the doubt in my mind; and if I should alter my opinion and receive a different impression, I will mention it again. In the meantime, I think this bill ought to be dismissed, but, in consequence of these transactions, without costs.

Bill dismissed without costs.

June 5th.

JONES v. GREEN.

By an indenture, a farm and lands were demised to a tenant at a yearly rent, and also under and subject to certain yearly payments, in case the tenant should not crop,

manure, and manage the farm in manner therein specified and covenanted; and also in case the tenant, in the last three years of the term, should sow more than seventy acres of clover in one year, the additional rent of 10*l.* an acre for every acre above seventy acres, for the residue of the term:—*Held*, that the additional rents were in the nature of liquidated damages, and not of penalties; and therefore, on a bill filed by the landlord for a discovery of breaches of the covenants in aid of an action at law, a plea that the discovery might subject the tenant to penalties, was overruled.

BY an indenture of lease, dated 16th *August*, 1813, *Richard Day* demised and leased a farm and lands at *Bexley*, in the county of *Kent*, to one *John Solomon*, his executors, administrators, and assigns, for a term of fourteen years, from the 29th *September*, 1814, at the yearly

rent of 200*l.*, and such other additional rents as therein-after mentioned; and, by such lease, *John Solomon*, for himself, his heirs, executors, administrators and assigns, covenanted and agreed, that he, his executors, administrators and assigns, should and would repair and keep in repair the said farm, buildings, and premises, in the manner therein mentioned; and should and would, during the term thereby demised, use and manage the meadow and pasture land, and plough and sow, till, crop, use, and manage in a careful and husband-like manner, the arable lands thereby demised, and crop, manure, and manage the said farm and lands in the manner therein particularly mentioned and specified; and also, that he the said *John Solomon*, his executors, administrators or assigns, should not nor would *at any time during the last three years of the said term, sow more than seventy acres of clover in one year, or, if he did so, should pay an additional rent of 10*l.* for every acre above seventy acres, for the residue of the said term, in the same manner and at the same times as the said annual rent of 200*l.* was to be paid and payable.*

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149*ll.* 740.

Shortly after the execution of this lease, the fee-simple and reversion, expectant on the determination of the lease, became vested in the plaintiff.

In the year 1822, the lease of the said premises became assigned to and vested in the defendant, who, in that year, entered into the possession and occupation of the farm, lands, and premises, as the tenant thereof under the said lease, and he continued to hold the same as the lessee or assignee of the lease, or as tenant thereof, under and subject to the covenants contained in the said lease, until *September, 1828*, when the term of fourteen years expired; and the defendant paid the rent for the premises to the plaintiff some time before and until the expiration of the lease, when the defendant retired from and quitted the possession of the farm and lands.

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In *February*, 1829, the plaintiff filed his bill, alleging that, during the latter part of the time the defendant held and occupied the farm and lands, and within the last two or three years of the said term, the defendant was guilty of and committed the various breaches of the covenants contained in the said lease, mentioned and specified in the bill; and that he had mismanaged and miscultivated the farm and lands in the several particulars and respects stated in the bill. The bill further alleged, that the plaintiff had sustained great loss and injury by the mismanagement of the farm, and by the breaches of the covenants; and that the defendant had left the farm and buildings in an impoverished and dilapidated state; and that the plaintiff had brought an action against the defendant to recover compensation for the damage done to the farm, but in which he was unable to proceed with effect without a discovery. The bill prayed a discovery.

The defendant, as to so much of the bill as called upon him to discover whether he had not committed some, and what breaches of the covenants or agreements contained in the lease (so far as such covenants and agreements related to the selling, disposing, or carrying from off the demised land and premises any of the hay, clover, straw, or turnips, or any of the halme there arising, or to the sowing, at any time or times during the last three years of the demise made by the said lease, more than seventy acres of corn in any one year); and whether the defendant did not take and carry from the farm and lands, and sell and dispose of a great, or some and what quantity of the hay, straw and halme which grew or was produced on the farm, without bringing back a sufficient and proper quantity of dung or other manure for the improvement of the land; and whether the defendant did not, in the three last years of his holding, or in one, and which of those years, plough up and sow with corn, some and what greater number of acres of arable land than he was entitled to do, under the

covenants and agreements in the said lease; the defendant pleaded the lease of the 16th *August*, 1813, by which the several lands in the plea described were demised unto the said *John Solomon*, his executors, administrators and assigns, from the 29th of *September*, 1814, for the term of fourteen years, yielding and paying therefore, yearly and every year, during the said term, unto the said *Richard Day*, his heirs and assigns, the yearly rent or sum of 200*l.*, by equal half-yearly payments, free and clear of the land-tax, and all other rates, taxes, deductions, impositions or abatements whatsoever, parliamentary or parochial, (except the property tax); and further yielding and paying unto the said *Richard Day*, his heirs and assigns, the further yearly rent or sum of 20*l.* for each and every acre of the meadow or pasture land thereby demised, which should at any time or times during that demise be ploughed, digged, broken up, or converted into tillage, contrary to the covenant thereafter mentioned, and so in proportion for a greater or less quantity than an acre, (except as therein is mentioned and allowed); and by which indenture the said *John Solomon*, for himself, his executors, and administrators, did covenant with the said *Richard Day*, his heirs and assigns, amongst other things, in manner following, that is to say, that he the said *John Solomon*, his executors or administrators, should and would, yearly and every year, during the term thereby granted, in barn or stack on the said demised premises all the corn, grain, hay, clover, or other stover, which should arise on the said demised premises, or any part thereof, and should not nor would sell, dispose, or carry from off the said demised lands and premises, any of the hay, clover, straw, or turnips, or any of the halme there arising, but should and would spend and consume, with his and their cattle or otherwise, upon some part of the premises thereby demised, and not elsewhere, all such hay, clover, straw, and turnips, unless the said *John Solomon*, his executors and administrators, should, for

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every load of hay, clover or stover, straw or turnips, so sold or disposed, or carried from off the said demised premises, bring, lay, spread and bestow, in a husband-like manner, on some part or parts of the said demised lands and premises, where most wanting, one full waggon or cart load of good dung or lime, for bettering and improving the said lands, under the penalty of 5*l.* for every waggon or cart load of hay, clover or stover, straw or turnips, so taken or sold from off the said premises; and also, that the said *John Solomon*, his executors or administrators, should not nor would, at any time or times during the last three years of that demise, sow more than seventy acres of corn in any one year, upon penalty of forfeiting and paying to said *Richard Day*, his heirs and assigns, the sum of 10*l.* for every acre over and above the said seventy acres so sown, and so in proportion for every greater or lesser quantity than an acre; such additional rent to be paid and payable for the residue of the said term of fourteen years, at the times and in the manner therein before mentioned for the payment of the said reserved rent of 200*l.*

The plea was supported by an answer.

Mr. *Treslove* and Mr. *Robert Roupell*, in support of the bill.—Though the remedy is at law upon the covenant, yet it is in the nature of liquidated damages, and not of a penalty, and therefore, for the purpose of ascertaining the damages, the plaintiff is entitled to a discovery in a Court of Equity. *Rolfe v. Peterson* (a), *Aylett v. Dodd* (b), *Benson v. Gibson* (c), *Woodward v. Gyles* (d), *Blake v. East India Company* (e). It has been decided that where a person, as in the present case, by his own agreement, subjects himself to a payment in the nature of a penalty, if he does a particular act, a demurrer to a discovery of

(a) 2 Bro. P. C. Toml. edit. 436.

(d) 2 Vern. 119.

(b) 2 Atk. 238.

(e) 2 Ch. C. 199.

(c) 3 Atk. 395.

that act will not hold. *Richards v. Cole*, in *Chancery*, *Exch. Ch. in Eq.* 1829.
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Mr. *Tinney*, for the plea.—This being the case of a lease under seal, and not a mere agreement, the action at law must necessarily be for a breach of covenant, and must seek to recover the exact penal rent reserved and made payable by the lease and covenant; and therefore, at law, the plaintiff will recover a penalty, and not damages, as on an implied *assumpsit*. The distinction between instruments under seal and those which are not, is now well established: if not under seal, the action is on a mere implied *assumpsit*, and the damages appearing to be sustained, are recovered; but not so where the instrument is under seal. This was formerly so at law, with respect to actions on bonds, where the Courts only looked to what was under hand and seal, and Equity for a length of time interfered. In this case, it is clear a Court of law could not give any thing beyond the 5*l.* penalty. The form of remedy which the plaintiff has taken, is one under which he can only recover the penalty, and not damages. In *Richards v. Cole*, the tenant had expressly covenanted not to do particular acts, with a proviso that, if he should do those acts, then he should pay a given sum. In the present case, the proviso in the lease, that, if above seventy acres be ploughed, 10*l.* *per* acre shall be paid for the residue of the term, is absolute, whether the land be again converted into meadow or not. The land being therefore turned into corn land for one year, subjects the party to a penalty of 10*l.* an acre for the residue of the term, which must be clearly considered as a penalty, and not in the nature of damages.

LORD CHIEF BARON.—This is a case of considerable consequence; but I do not feel sufficient doubt upon it

(a) Lord Red. on Pl. 3rd edit. 159.

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to take any time to consider of it. I have an extremely clear opinion that this plea must be over-ruled. Much controversy has arisen in this case in consequence of the word "penalty" being used in some parts of the lease, whilst in other parts the words "compensation" and "additional rent" are used. I do not think it is a fair way of treating this case, to consider it as depending upon the use of these words; but that it ought to be considered upon the nature and substance of the stipulations with respect to each other. Since the case of *Rolfe and Peterson*, in the House of Lords, in all cases between the landlord and tenant, whether the term used has been "penalty" or "liquidated damages," or "additional rent," or any other similar expression, it has always been considered, on the authority of that case, as the rule of the Court, that it should not be considered as a penalty, in order to protect the defendant from answering, but as stipulated damages, or additional rent, and as entitling the plaintiff to a discovery of the transaction. I am the more confirmed in this, when I recollect the case of *Pulteney and Shelton*(a); since which it has been the constant habit of Courts of equity to interpose on behalf of a party who has been guilty of a breach of covenant, by injunction, which they could not do, if in truth he could in any case protect himself from that discovery which the Court of equity usually gives; and, therefore, I do not care whether the expression "penalty" or "stipulated damages" is used; it is the substance of the thing for which the payment is intended to be made, and it is a compensation stipulated to be paid for the mismanagement of the farm. It has been said, and very ingeniously, in order to distinguish this from a case referred to in a book of very great authority, that, in that case, the tenant had actually himself covenanted not to do the thing for which the additional payment was to be made,

(a) 5 Ves. 147, 260.

which the defendant has not done here. Now, I will not undertake to decide whether, by taking possession and holding under that instrument, the defendant is not precluded from saying he did not covenant to do those things. I think he has covenanted; and I think the case comes directly within the principle of that mentioned by Lord *Redesdale*, in that respect; but if he has not covenanted, the action cannot be maintained: whilst, if I were to allow this plea, it would prevent the Court of law from giving the plaintiff that remedy which he is entitled to, if there is such a covenant. If the defendant chooses to come here, and say there are penalties, and I am desirous to know the *quantum damnificatus*, then it is competent for this Court, or any Court, to take the same course under these circumstances, which the House of Lords did in the case of *Rolf and Peterson*, to ascertain whether these are not stipulated damages, or whether they are penalties, in which a Court of Equity, as a Court of Equity, will interpose and direct an issue to ascertain the *quantum damnificatus*. I think, that to pursue any other course would be an extremely inconvenient one to persons standing in the relative situation of landlord and tenant, as it would have the effect of protecting the tenant from paying that additional rent which he has contracted to pay. I think I should do very great mischief and injustice to the landlord, if I protected the defendant from this discovery; and, therefore, I think the plea should be over-ruled.

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Plea over-ruled.

GASKELL v. GASKELL.

June 11th.

THE Master having made his report in this case, exceptions were taken to it on the part of the defendant

This Court does not direct a case for the opinion of a Court of law, as the

Court of Chancery does, but only directs the matter to be heard before the full Court.

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Betty Gaskell, and those exceptions now coming on to be argued—

Mr. *Spence* and Mr. *Lowndes*, for the defendant *Betty Gaskell*, requested to have the question of appropriation put into a train for trial in a Court of law; and suggested that a case should be sent to the Court of *Common Pleas*.

The LORD CHIEF BARON said—That course never had been, and he did not think it could be taken in this Court. The only thing he could do, would be to direct the exceptions to be set down for hearing before the whole Court.

It was subsequently stated, that the plaintiff had instituted a suit in respect to the same matters in the Court of *Chancery*; upon which the Lord Chief Baron observed, that, under the circumstances, he would over-rule the exceptions. He, at the same time, did not think the parties at all to blame in going to the Court of *Chancery*, as that Court could put the matter into a course for trial at law, which this Court could not.

END OF EASTER TERM AND SITTINGS AFTER.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Exchequer,

IN

TRINITY TERM, 10 GEO. IV. AND THE SITTINGS AFTER.

MEMORANDA.

IN the vacation after *Easter Term*, Sir *Nicholas Conyngham Tindal*, Knt., his Majesty's Solicitor-General, was appointed Chief Justice of the Court of *Common Pleas*, in the room of the Right Honourable Sir *William Draper Best*; who was created a Peer of the United Kingdom, by the title of Baron *Wynford*, of *Wynford Eagle*, in the county of *Dorset*.

Sir *James Scarlett*; Knt., was re-appointed his Majesty's Attorney-General, upon the resignation of Sir *Charles Wetherell*, Knt.; and *Edward Burtenshaw Sugden*, Esq., was appointed his Majesty's Solicitor-General, upon the promotion of Sir *N. C. Tindal*, Knt., and was knighted.

In the course of this Term, *William Henry Tinney*, *Thomas Pemberton*, *James Lewis Knight*, Esqrs., and the Honourable *Charles Ewen Law*, were respectively created his Majesty's counsel learned in the law, and took their seats within the bar accordingly.

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EXCHEQUER OF PLEAS.

WINTER v. CHARTER.

Where, upon the diversion of a turnpike road after the new road had been completed, but before the old road was stopped up, the trustees, by the permission of *B.*, broke down his fence to make a passage from the new road to the close of *A.*, but did not put up a gate or fence to protect the latter close:—
Held, that the trustees were wrong-doers, and that *B.* was responsible for their acts.

THIS was an action on the case, brought by the plaintiff against the defendant, for prostrating and removing, and suffering and permitting to be prostrated and removed, parts of a certain hedge and fence lying between certain closes of the plaintiff and the defendant; it was admitted that the hedge and fence belonged to the said defendant, and that he had always kept up and maintained the same. The declaration also contained counts for permitting the said fence, after the same had been prostrated and removed, against the will and consent of the said plaintiff, to be and continue prostrated and removed; by means whereof the plaintiff's cattle strayed through the said defects, and thence and over the said defendant's close, unto and into a certain public highway, and also other cattle, lawfully being and passing along the said highway, strayed over the said defendant's close, and unto and into the said plaintiff's close.

The action was tried at the last *Summer Assizes*, at *Wells*, before *Littledale, J.*, when a verdict was found for the plaintiff, with 1*s.* damages, subject to the opinion of the Court upon the following case:—

“ The plaintiff was owner and occupier of a close, called *Rook's Castle*, and the defendant owner and occupier of a close, called *Higher Field*, otherwise *Linhay Field*, both in the county of *Somerset*. These closes were separated from each other by a fence or hedge, which the defendant was bound to repair, and both abutted, to the south, upon a certain public turnpike road, formerly the *Taunton* turnpike road, leading from *Taunton* to *Hartrow Gate*: the access to the said close of the said plaintiff was by a gate opening into the said road. By a certain order of the commissioners of the *Taunton Turn-*

pike Roads, bearing date 6th *June*, 1826, it was ordered that a new line of turnpike road should be made, leading from the south-eastern corner of a certain close, called *Lynch-five-Acres*, near the *Lethbridge Arms* Inn, to a certain beech tree in the said road from *Taunton* to *Hart-row Gate* aforesaid, in a direction to the north of the said closes of the plaintiff and defendant; which new road was to pass immediately contiguous to the north-east angle of the said plaintiff's close. By the same order, the old line of turnpike road was ordered to be stopped up, and the land and soil thereof to be vested in Sir *T. B. Lethbridge*, Bart.; but the former part of the said order only was confirmed upon appeal to the Quarter Sessions, and the old turnpike road, at the time in question, remained open to the public, no subsequent order having been made for the purpose of stopping it up. The new line of road was forthwith executed; and, by an order in writing, of the commissioners of the said road, bearing date the 4th *December*, 1827, it appeared that the report of a committee appointed by the said commissioners, stating that the said new road was completed in a substantial, sufficient, and workman-like manner, was received and approved. By a subsequent order of the said commissioners, bearing date the said 4th *December*, 1827, it was ordered that a passage or way should be opened from the said new road to the said plaintiff's said close, called *Rook's Castle*, through the hedge and ditch of the said close of the said defendant, he, the said defendant, having consented to the same in a paper writing produced at the meeting of the said commissioners, at which the said last-mentioned order was made. The said consent in writing of the said defendant was unstamped, and in the terms following: "I hereby consent that the commissioners of the *Taunton* Turnpike Road, or any other person or persons, may enter a close of land belonging to me in the parish of *Bishop's Lydland*, in the county of *Somerset*, called the *Higher Field*, otherwise the *Lin-*

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hay Field, and there to take down a sufficient part of the fence or hedge, at the north-west corner of the said field or ground, adjoining and abutting as well to a close of land called *Rook's Castle*, in the occupation of Mr. *John Winter*, as also to the new line of the *Taunton* Turnpike Road, running in a northerly line from a field called *Lynch-five-Acres*, towards and unto a beech tree, in the parish of *Coombe Florey*." This paper was dated the 4th of *December*, 1827. And was signed by the defendant.

"Before this time, application had been made to the defendant, for his consent to make the opening through his hedge into the plaintiff's close, that the commissioners might be enabled to stop up the old turnpike road leading from *Taunton* to *Hartrow Gate* as above-mentioned. On the 10th of the said month of *December*, the hedge and fence of the said defendant were removed, and a part of the ditch filled up, by the surveyor of the *Taunton* Turnpike Road, and by the directions of the commissioners of the said road, leaving an open space sufficient for a gate and post, and opening a direct communication with the said new road, across and over the site of the said hedge so removed. The said surveyor told the said plaintiff, that what he had done, was by the direction of the trustees of the road, and shewed a copy of the above last-recited order; the said surveyor added, that if the said plaintiff would lend him a couple of hurdles, he, the said surveyor, had a man who would take them and put them up in the gap, to prevent the stock from escaping; the plaintiff, however, refused, and added, that he had a gate already from the old road into *Rook's Castle Field*. No conveyance of the site of the said hedge and ditch, so removed, or the space between the said plaintiff's close and the said new road, was ever executed by the said defendant to the said commissioners, nor was any other authority or licence whatsoever given, except the consent in writing aforesaid; nor had any licence or consent been given by

the said defendant to the said plaintiff, to place any gate or fence upon, or to pass over the site of, the said hedge and ditch, being the defendant's close, unto and into the said new road; and it appeared that the said plaintiff could erect no sufficient gate or fence, in order to prevent the cattle in his said close from straying, or cattle from without entering thereon across the said gap, without placing the same upon or over part of the site of the hedge and ditch so removed; and, that neither the said commissioners, nor the said defendant, had, after the removal of the said hedge, erected, or caused to be erected, any hedge or fence upon the spot where the old hedge and ditch had been removed and filled up, nor had any application been made by the said plaintiff to the said defendant or the said commissioners, upon the subject; but the plaintiff's close remained and continued from thence until the commencement of the said action, and at the time of the trial remained open and exposed to the said new turnpike road." The question for the opinion of the Court was, whether, under these circumstances, the plaintiff was entitled to maintain his action.

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Jeremy, for the plaintiff.—It is found by the case, that the defendant was personally liable; and until his interest be divested, his liability will continue. To get rid of that liability, the defendant must shew either that he has parted with the possession of the close to which the liability attaches, so as to transfer the liability, or that what has been done, was done in pursuance of some legislative authority. Now, the licence does not amount to a transfer of the possession; and that being so, it is clear that an action upon the case may be maintained against one who, being liable, licenses another to prostrate his fence. In this view, the language of the licence is very material, it does not amount to a dedication, nor does it confer a right of way; it gives the plaintiff no permanent interest, but may, at any moment, be determined at the caprice of the de-

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fendant. Can the act then be justified by any legislative authority? To prove this, it must be shewn that the trustees have authority to make a passage from the new road; and that, having that power, they have strictly pursued it. The trustees have no such authority. The stat. 3 *Geo. 4*, c. 126, s. 88, upon which the defendant relies, after providing that when any turnpike road shall be diverted, and the new road made, the new road shall be subject to the same regulations as the old, and that the old road shall be stopped up and sold, enacts, that if such old road shall lead to any lands, &c. which cannot, in the opinion of the trustees, be conveniently accommodated with a passage from the new road, "which passage they are hereby authorized to order and lay out if they find it necessary," then the old road is to be sold, subject to the right of way to such lands, &c. Now, the power to make a passage, conferred by this section, can only apply to cases in which that accommodation may be made by contiguity, and must be inapplicable to lands which do not come in contact with the new road; for, if the trustees may go over any portion of the land of a third person, they may make the passage over a whole field; and if over one, why not over several. For this purpose, they have no authority to acquire land by purchase, much less to make the passage over the property of third persons. At all events, as the old road was not, at the time, stopped up, and no order for that purpose was then in existence, there could be no necessity for a passage; and, therefore, in the greatest latitude of construction, this clause could confer no authority. But, conceding that the word "passage" may comprehend a branch road, still the trustees have not pursued their authority. Their first duty was to secure to the plaintiff a permanent right of way, which they have not done; for a mere parol licence is revocable at will. By the provisions of the stat. 4 *Geo. 4*, c. 95, s. 66, they were bound to fence and protect the lands adjoining from trespasses; this, likewise they have neglected to do. Not having

complied with the provisions of the statute, they are wrong-doers; and as there can be no obligation upon them, the land not being required for the new road, the defendant, who authorized this act, is properly responsible.

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Rogers, for the defendant.—Although the question is of inconsiderable moment, the principle is of great importance; for, if these acts be construed rigidly, the intention of the Legislature can never be carried into effect. The defendant is justified, if the trustees had jurisdiction; and even though they exceeded their jurisdiction, the defendant is relieved, under the circumstances, from all liability. The new road having been completed, the trustees had authority to make the passage, under the statute 3 *Geo.* 4, c. 126, s. 88. It is said, however, that the old road had not been stopped up, and that, therefore, there was no necessity for the passage, and the ulterior powers of the trustees did not arise. It was absolutely necessary to make the passage before the old road was stopped; for, otherwise, it would be a good objection, upon an appeal, to say, that, by stopping up the old road, all access to the close would be taken away. To say that the old road must be stopped up before the new communication is made, would be in violation of a plain enactment, for, until the access had been made, the road could not properly be stopped up. But it is immaterial which precedes, where the trustees act *bond fide*. The question of priority is properly in their discretion; and the case of *De Beauvoir v. Welch* (a), shews that in such cases their discretion is plenary. Indeed, by the completion of the new road, the old road is virtually stopped up, 3 *Geo.* 4, c. 125, s. 86, and the necessity of an order is dispensed with. This power of the trustees must be exercised according to the exigency of the case, and the convenience of all parties. It would be absurd to limit it to the single case of a close abutting upon the road;

(a) 1 M. & R. 81; 7 B. & C. 266.

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and in the statute no words warrant that construction. It is, however, said, that the plaintiff has acquired no permanent interest in the way, and that, therefore, the trustees have not acted within the scope of their authority. By the 83rd sect. they are empowered to purchase lands, but are not compellable to do so, if they can otherwise acquire a right; and, upon the principle which decided the case of *Hollis v. Goldfinch* (a), it is clear that a right may otherwise be acquired. That right has, in this case, been acquired by the consent of the defendant, and by the order of the trustees, which, unappealed against, is final and conclusive, 4 *Geo. 4*, c. 95, s. 87. It must be admitted, that the trustees have been guilty of a nonfeasance in omitting to fence the road; but the defendant, having relinquished all his right by his licence and omission to appeal, cannot be answerable for their nonfeasance.

Jeremy replied.

ALEXANDER, L. C. B.—The allegation, upon the part of the plaintiff, is, that the defendant is bound by law to maintain a fence which protects his field, that the defendant has not done so, but that, on the contrary, some person, by his authority, and by his consent, has prostrated that fence, so that the field remains unprotected. Upon this statement there is a clear *prima facie* case, which requires an answer; and the answer which the defendant gives is, that the act complained of has not been done by him, but, with his consent, by some other person, who is authorized by legislative authority to do the act. The defendant takes upon himself the burthen of shewing that the act was authorized by legislative enactment, and it is incumbent upon him to shew that authority. By the 83rd section of the statute 3 *Geo. 4*, c. 125, the trustees are invested with powers to alter roads; and then follows the 88th section, by which, if at

(a) 1 B. & C. 205; 2 D. & R. 316.

all, this act must be justified. That section enacts, "that when any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and be subject to all the provisions and regulations in any act of Parliament contained, or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose land adjoins thereto, as in the act is mentioned with regard to pieces of land not wanted." And then follows the provision which applies more closely to this subject: "but if such old road shall lead to any lands, house, or place, which cannot, in the opinion of the trustees or commissioners, be conveniently accommodated with a passage from such new road, which they are hereby authorized to order and lay out if they find it necessary, then, and in such case, the old road shall be sold, but subject to the right of way and passage to such lands, house, or place respectively." Upon this latter provision, this question depends. Now, it appears to me, that this particular case is not specifically provided for by this section; because the framers of the act had nothing in view beyond the mere making of a road to the particular place, and the necessity of breaking through the land of a third person did not occur to them. It must be indifferent to the parties in what manner this passage is made, provided the plaintiff be put in the same situation in which he was before the road was diverted; and it is, therefore, surprising, how this question has arisen. But he ought to be put in the same situation. He complains, however, that he has been inconvenienced; that they have not put the gate and fence to protect his field; and, in short, that they have not given him the way. Now, although this inconvenience does not proceed from the immediate act of the defendant, yet, as he authorized the trustees to commit it, he should have

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stipulated that it should be done in such a manner, that the obligation cast upon him by law might be complied with. He has not provided for that; and, as the trustees had no authority to make the passage over his land without his consent, they must be taken to be his agents, and he is responsible for their acts. Upon this ground, without examining the other questions, upon which much might be said, I am of opinion that this action is maintainable.

GARROW, B., was of the same opinion.

HULLOCK, B.—I am of opinion that this action was, under the circumstances, sustainable, and that the verdict is right. This is an action on the case, complaining that a certain fence running through the fields of the plaintiff and defendant, to the repair of which the defendant is admitted to be liable, has been permitted to be prostrated and broken down, by means of which the plaintiff has sustained an injury. Were there no other circumstances in the case, the action would be clearly maintainable. But the defendant says, the act of which you complain does not originate with me, but is to be ascribed to the trustees, who are fully warranted by act of Parliament in doing that which they did. If that could be made out, it would amount to a complete defence in point of law; but it has not been established. The order of the trustees to stop the old road was *coram non judice*, for their jurisdiction in that respect did not arise until the new road was completed; notwithstanding which, an order was made to divert and to stop the old road, at one and the same time. Were it necessary, upon the present occasion, to give any opinion upon their authority to stop up the old road now, I should feel little difficulty in saying, that they have that power, either absolutely, or subject to certain restrictions. In this respect they must exercise a discretion as to reserving a public or private right of way; for, by the act of Parliament, the old road cannot be stopped up or sold, unless a new passage can

be conveniently attained to the lands adjoining. There is now nothing to prevent the trustees from stopping up the old road, either absolutely or conditionally. But the question is, whether, the old road not having been stopped up, the trustees were justified, by the 88th section, in the course which they have pursued. It seems to me, that they have exceeded their authority. Admitting, for the argument, that they had a right to open this way into the field of the plaintiff; still they had no right to leave it in the state in which they did leave it. They had no right to impose upon the plaintiff the necessity of making a gate, or of incurring any expense, he having a road which he was entitled to by law, and had always enjoyed. It might have been different had they opened the gap and put a gate there. But it is clear, the Legislature contemplated that the trustees were bound to protect the inclosures, when an act of this description was done, as is evident from the 66th section of the 4 Geo. 4, c. 95, which, although not in terms applicable to this subject, is sufficient to shew upon whom the Legislature intended to throw the expense of fencing, when necessary in consequence of an improvement of the road. Nothing of this kind has been done, but, on the contrary, the close of the plaintiff has been left open and exposed. It is said, that there is an order to make this passage, which, not having been appealed against, is final. But, if the order was extra-judicial, and they had no authority to make it, the consent will be inoperative to confer an authority, and the question comes to the same point, had they jurisdiction. Without deciding whether the trustees were premature in the course which they pursued, or whether they were authorized at all, the ground of my decision is, that, if they were authorized, they have not done that which, by the act of Parliament, they were bound to do. They, therefore, were wrongdoers, and the defendant, who licensed their act, is answerable for the consequences, and liable in this action.

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VAUGHAN, B.—I am of the same opinion. The liability of the defendant is admitted, unless he be discharged by the act of the trustees. In the highest and lowest offences all are principals, and if the defendant authorized the act of the trustees, it must be considered in the same manner as if it were done by his own hand. This brings it to the question, whether the trustees had authority to do the act complained of. It appears, however, that, whatever might have been their authority, they have not exercised it according to the powers given to them by law. If, by the 88th section, they had power to make the opening, they were not justified in leaving it as they did, without fencing and protecting it from the road and adjoining close. Upon this short ground, I think that the action is maintainable.

Postea to the plaintiff.

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An agreement between three persons carrying on the trade of trunk and box makers, and travelling, by themselves and their

ASSUMPSIT. The first count of the declaration stated, that, before and at the time of making the articles of agreement, and the promise and undertaking of the said defend-

servants, into various parts of England, to vend trunks and boxes, to divide, and not interfere with certain districts of the several cities, boroughs, towns, and villages, as set forth by them on *Bowles's Post-map of England*; and that each, during his life, by himself, and his agents duly authorized, shall travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever, by either of the other two, during their joint lives, in certain cities, boroughs, towns, and villages, and not to suffer any goods in the said trade to be manufactured at their respective shops or warehouses, or to be sent from their respective shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of on the ground to be travelled by the other parties thereto; and not to aid or assist any person to oppose all, or any, and either of the parties; and not to purchase any tea chest or chests, black or green, at a higher price than 6d. or 8d. each in *Oxford*; and in case, at any time, during their joint lives, any person or persons shall set up and oppose any or either of the parties, to meet together, and enter into such mutual agreement, to the intent therein agreed to, as shall be beneficial to the mutual interests of the parties, it being declared to be their intentions not to do any act prejudicial to the interests of each other, but to aid and assist each other in their said trade and business, to the utmost of their power, does not operate in general restraint of trade, and, as an agreement contemplating a partial restraint only, is founded on a sufficient and valid consideration. Therefore, counts setting forth the same, and averring, by way of breaches, that the defendant travelled into the districts of the plaintiff, and sold boxes therein:—*Held* good, on general demurrer.

ant thereafter next mentioned, the said plaintiff was a box-maker, and the trade, business, and calling of a box-maker had used, exercised, and carried on, and still did use, exercise, and carry on, to wit, at *Oxford*, in the county of *Oxford*; and whereas, before and until the making of the said articles of agreement, the said plaintiff, from time to time, travelled, by himself and his servants, into various parts of the country, and of the several districts in the said articles of agreement mentioned and referred to, for there vending trunks and boxes, by him made in his said trade, business, and calling; and the said defendant and one *William Fletcher* also severally and respectively exercised and carried on the said trade, business, and calling of box-makers, and, severally and respectively, travelled into various parts of the country and of the several districts aforesaid, for there severally and respectively vending and selling trunks and boxes, to wit, at *Oxford* aforesaid, in the county aforesaid; and thereupon, theretofore, to wit, on &c., at &c., by certain articles of agreement, bearing date a certain day and year, to wit, &c., then and there made and entered into, between the said *William Fletcher*, of the first part; the said defendant, of the second part; and the said plaintiff, of the third part; reciting, that, whereas the said *William Fletcher*, *Daniel Evans*, and *Joseph Wickens* had, for several years last past, travelled into various parts of the country, vending trunks and boxes for sale, but, on account of the inconvenience and loss which they severally acknowledged to sustain, by reason of their exercising their trade and calling in places which they wished to keep separate and distinct from each other, they, the said *William Fletcher*, *Daniel Evans*, and *Joseph Wickens*, had, in consideration thereof, agreed to divide the same, and enter into the terms and conditions thereafter mentioned relative to such division, (that is to say), the said *William Fletcher*, *Daniel Evans*, and *Joseph Wickens* did thereby,

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5. 11. 16. 440.
1. 11. 11. 555.
1. 6. 9. 336.

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severally and respectively, agree with each other to divide, and not interfere with certain districts of the several cities, boroughs, towns, and villages, set forth on *Bowles's Post-map of England and Wales*, thereto annexed and referred to, and signed with the respective proper hand-writing of the said *William Fletcher*, *Daniel Evans*, and *Joseph Wickens*, it being the true intent and meaning of the said parties thereto, and of those presents, that the said *William Fletcher* should and might, at all times thereafter, during the life of the said *William Fletcher*, by himself and his agents (duly authorized only), travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said *Daniel Evans* and *Joseph Wickens*, or either of them, during their joint natural lives, in the several cities, boroughs, towns, and villages, marked with ink, and set out with black cotton, so set forth and described on the said map, as aforesaid; and also, that the said *Daniel Evans* should and might, at all times thereafter, during the life of him the said *Daniel Evans*, by himself and his agents (duly authorized only), travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said *William Fletcher* and *Joseph Wickens*, or either of them, during their joint natural lives, in the several cities, boroughs, towns, and villages, marked with ink, and set out with black cotton, so set forth and described on the said map, as aforesaid; and also, that the said *Joseph Wickens* should and might, at all times thereafter, during the life of him the said *Joseph Wickens*, by himself and his agents (duly authorized only), travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said *William Fletcher* and *Daniel Evans*, or either of them, during their joint natural lives, in the several cities, boroughs, towns, and villages, marked with ink, and set out with black cotton, so set forth and described on the said

map, as aforesaid. And it was thereby further agreed by and between the said parties thereto, that they, and each of them, should also be at liberty to travel, for such purposes of trade as aforesaid, during their joint natural lives, as aforesaid, to all such other places as might thereafter be built, although not set forth on the said map, so as such trading should not interfere with either of the said districts of the said parties thereto, so respectively marked out on the said map, as aforesaid; and also, it was thereby further agreed by and between the said parties thereto, that they should not, directly or indirectly, allow or suffer any goods in their said trade to be manufactured at their respective shops or warehouses, or be sent from their or his respective shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of, on the ground to be travelled by the said parties thereto, so marked out on the said map, as aforesaid, or in any manner whatsoever participate in any profits arising from any sale of the said goods in such respective districts as aforesaid, and so thereby agreed to be divided as aforesaid; and also, should not aid and assist any person or persons whomsoever, to oppose all, any, or either of the said parties thereto, in the said trade, in *England* and *Wales*; and it was thereby further mutually agreed by and between the said parties thereto, that they and each of them should not, nor would, during their joint natural lives, as aforesaid, buy or purchase any tea chest or chests, black or green, at a higher price than 6d. or 8d. each in *Oxford*; and it was thereby lastly agreed by and between all the said parties thereto, that they should not, by themselves, or either of them by himself, nor should their, or either of their servants or agents in that behalf, travel into the districts of each other, so set forth on the said map, or into any other place which might be thereafter built, forming the route of either of the said parties thereto, in the way of their or his said trade and business, to the injury and prejudice of each other. And

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for the true performance of that agreement, each of the said parties thereto bound himself unto the other of them, in the sum of 40*l.* as to the sale of trunks and boxes, and 10*l.* as to the purchase of any tea chest or chests, black or green, at a higher price than above stated, for each and every offence or infringement of all or any of the clauses above contained, to be recovered by way of liquidated damages, against the party or parties who should be guilty of any breach of that agreement, or of any part thereof. And moreover, it was further agreed, that if, at any time thereafter, during the joint natural lives of the said parties thereto, any person or persons should set up and oppose any or either of the said parties, in the said trade of box and trunk making in *England* and *Wales*, then, that the said parties thereto should and would meet together, and enter into such mutual agreement, to the intent therein above agreed to, as should be beneficial to the mutual interests of the said parties thereto, it being their, and each of their, true intention, not to do any act prejudicial to the interests of each other, but to aid and assist each other in the said trade and business, to the utmost of their power.

Breach—That the said defendant, not regarding the said articles of agreement, nor his said promise and undertaking, did, afterwards, to wit, on &c., and at and on divers, to wit, nine other times and occasions, between that day and the day of exhibiting the bill of the said plaintiff against the said defendant, travel, by himself and his servants and agents in that behalf, into the district of the said plaintiff, so set forth on the said map, in the way of his, the said defendant's, said trade and business, to the injury and prejudice of the said plaintiff, and did thereby commit divers, to wit, ten offences and infringements of the said articles of agreement against him the said plaintiff, whereby, and according to the form and effect of the said articles of agreement, the said defendant forfeited and became liable to pay to the said plain-

tiff the sum of 40*l.* of lawful money of *Great Britain*, for each and every of the said offences and infringements of the said articles of agreement by him the said defendant, amounting together to a certain large sum of money, to wit, the sum of 400*l.*, &c.

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The *second* count, after setting forth the agreement as in the first count, proceeded to aver, as breaches, that the defendant, on divers, to wit, nine times and occasions, did travel, by himself, and his servants and agents in that behalf, into the district of the plaintiff, in the way of the defendant's trade and business, and did, at and on each of those times and occasions, sell and dispose of divers large quantities of trunks and boxes, in the way of his said trade and business, amounting, in the whole, to a large sum of money, to wit, the sum of 3000*l.*, and thereby hindered and prevented the said plaintiff from selling and disposing of divers and very many trunks and boxes, which he otherwise might and would have there sold and disposed of, &c. General demurrer to the first and second counts, andjoinder therein.

Taunton, W. E., in support of the demurrer.—The agreement stated in the first and second counts of this declaration, operates in general restraint of trade, and is, therefore, void, or it is an agreement for a partial restraint, without a sufficient consideration. From the recitals, it appears to have been the object of the parties, to avoid the inconveniences they experienced, as competitors, from underselling each other, which, however, although a loss and a prejudice to them, was a benefit to all the subjects of the realm. The intent of each party is, to monopolize the business of a box-maker, and to secure to himself an exclusive sale in the particular district marked out on the map; and, for this purpose, each engages not to manufacture or sell goods, or to aid other persons in manufacturing or selling goods, to be sent into the districts of the other

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parties, and not to travel into those districts. They are not to purchase tea chests in *Oxford* at a higher price than is agreed upon; and, if they meet with any opposition, they are to concert measures for their own benefit. All these stipulations are inconsistent with the policy of the law; and the combination is illegal. Now, it is quite clear, that any agreement for the total restraint of trade, that is to say, an agreement whereby an individual is restrained from trading throughout the whole realm, during his life, is bad; but it is conceded, that a partial restraint may be good, provided there is a sufficient legal consideration. This distinction has long been admitted and acted upon. *Prugnell v. Goss* (a), *Broad v. Jollyfe* (b), *Anonymous* (c), 2 *Wms. Saunders*, 156, n. 1. In *Claygate v. Batchelor* (d), it was held, that the condition of a bond, restraining an apprentice from using the trade of a haberdasher within the county of *Kent* and the cities of *Canterbury* and *Rochester*, for the space of four years, was against law. Three reasons are assigned for this judgment:—"It is against the liberty of a freeman, and against the statute of *Magna Charta*, cap. 20, and is against the commonwealth. And *Anderson* said, that he might as well bind himself that he would not go to church." This decision is noticed by *Parker*, L. C. J., in his judgment in *Mitchell v. Reynolds* (e), wherein all the law upon this subject is fully explained. In *Comyns's Digest* (f), all the cases are collected, and the author lays it down, on his own authority, that "an obligation or promise, which restrains the total use of a man's trade for four years, will be void." In *Davenant and Hurdis*, cited in the Case of *Monopolies* (g), an ordinance by the company of Merchant Taylors of *London*, directing that every bro-

(a) All. 67.

(b) Cro. Jac. 596.

(c) Moore, 114.

(d) Ow. 143; S. C. Cro. Eliz. 872.

(e) 1 P. Wms. 181.

(f) Tit. "Trade," (D).

(g) 11 Rep. 86.

ther of the society should put out one half of his clothes to some brother of the said society, who exercised the art of a cloth-worker, was declared to be against the common law and the freedom of the subject, and was, therefore, adjudged void. In that case, nothing operated to the *total* restraint of trade, inasmuch as the ordinance related only to the brothers of the society. [*Hullock*, B.—But there was no consideration for the partial restraint.] There was a latent consideration arising from the obedience due from every member to the laws of the company, and an indirect benefit springing out of this bye law. The result of the decisions relative to the adequacy of the consideration is, that there must be an extrinsic, foreign, and collateral consideration, *dehors* the instrument, and not merely such as arises, as in this case, only upon the face of the instrument itself. That was the case in *Horner v. Ashford* (a). But, supposing that is not necessary, the only consideration here expressed amounts to an illegal combination between the three parties, to obtain a monopoly in their trade, throughout *England*. Such a combination, if good in the case of three persons, must be equally so with regard to any number. Thus, the brewers or distillers in *London* might enter into a similar agreement to divide the Metropolis into districts, the effect of which might be to supply the public with a commodity prepared with inferior ingredients, at a higher price.

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Cross, G. R., contra.—The law is correctly stated, when it is said, that no consideration can support an agreement operating as a general restraint of trade. Here, however, the restraint contemplated is not general, but confined to particular limits; and there is also an adequate and good consideration. The judgment in *Mitchell v. Reynolds* (b), and all the antecedent cases there referred to, clearly es-

(a) 3 Bing. 322.

(b) 10 Mod. 130.

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whether a contract not to exercise a trade within a particular place or parish is good, if made upon a fair and just consideration. This judgment also shews, that it is no good objection to a voluntary restraint, that it is against *Magna Charta*, or the liberty of the subject, for "*Magna Charta* provides against force and power, and not the voluntary acts of men: and if I sell my liberty to trade, it is no longer mine, but his to whom I sell it (a)." In *Colmer v. Clark* (b), a bond, restraining the obligor from carrying on his trade within the city and liberty of *Westminster* and the bills of mortality, for a limited time, was held good in law, the restraint from the exercise of trade being confined to a particular district, and founded on a valid consideration. The case of *Chesman v. Nainby* (c), was an action on a bond conditioned not to set up the trade of a linen-draper, or to assist or instruct any other person in the managing and carrying on of that trade, within the space of half a mile from the plaintiff's dwelling-house, or of any other house, to which she, her executors, or administrators, might think fit to remove. This bond was held to be valid, and the plaintiff obtained judgment, which was affirmed on error. In like manner, in *Davis v. Mason* (d), a bond, not to practise as a surgeon, for fourteen years, within ten miles of the town of *Thetford*, where the plaintiff lived, was held good, although it was objected, that the limits, as to time and place, were unreasonable. Lord *Kenyon*, C. J., in that case, observed:—"I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line. Neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practise as a surgeon in this town." This last observation applies forcibly to the agreement now in question, inasmuch as every other box-maker is at liberty

(a) 10 Mod. 134.

(b) 7 Mod. 230.

(c) 2 Stra. 739; S. C. Lord

Raym. 1456; S. C. Bro. Parl. Ca. 349.

(d) 5 T. R. 118.

to carry on business in any of the districts to which the agreement is referrible. Nor is the consideration insufficient or invalid. "A consideration of loss or inconvenience, sustained by one party at the request of another, is as good a consideration in law for a promise by such other, as a consideration of profit or convenience to himself."—*Per Lord Ellenborough, C. J., in Bunn v. Guy (a)*. Here, then, there appears, upon the face of the agreement, to be a benefit obtained by the defendant, and a loss incurred by the plaintiff, at the same time that the public will not be deprived of the advantages arising from the competition of other box-makers, and, it is to be presumed, will obtain boxes and trunks cheaper from these three parties, by reason of the deduction of two-thirds from the expenses of travelling. The stipulation of the parties to aid and assist each other, is nothing more than is commonly undertaken by all partners, and, therefore, cannot vitiate the contract.

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Taunton, in reply.—It is the policy of the law to support the freedom of trade; and, therefore, all contracts imposing particular restraints, are, *prima facie*, presumed to be void. In former times, they were looked upon by the Courts with great jealousy, as appears from the strong expressions of Judge *Hall (b)*:—" *A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre common ley, et per Dieu si le plaintiff fuit icy, il irra al prison tanq: ill ust fait fine au roy.*" In all the cases cited there was an extrinsic consideration, independent of the agreement, and a loss and benefit before the agreement was entered into, as in the ordinary instances of a tradesman giving up the goodwill of his business to his shop-man or apprentice.

GARROW, B.—This question, as it appears to me, is

(a) 4 East, 190-4.

(b) 2 H. 5, f. 5.

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confined within a narrow compass; and, as we have all formed the same opinion, I shall state my view of it very shortly. The principles upon which the decisions upon subjects of this nature are founded, have been accurately stated; and, indeed, have so frequently and so long been acted upon, that they are now indisputable. A general, universal, restraint of trade, inasmuch as it affects the public property and the interests of the community, is bad; and those to whose interests it more immediately relates, cannot make it good by any consideration passing between themselves. But, it is submitted, that there may be, upon a good consideration, a partial restraint of trade; and that an agreement for that purpose is sustainable, and has been sustained. The legality of a partial restraint of trade has been established in a variety of cases; and the general transactions of mankind furnish daily instances of its existence. Without resorting to the aid of black cotton lines, in order to divide all *England* into districts, there is no man engaged in trade who does not, in effect, impose some restraint upon himself, in point of practice, by confining himself within a particular district, and circumscribing his trade within certain bounds. It has been supposed that the public are interested in precluding the parties from entering into the agreement now in question; but, I think it very doubtful, whether the benefit of the public would be best consulted by these three persons continuing to travel over the whole country, or by each confining himself to the district marked out in the map. Let us see what is the case now presented. It appears, according to the recital in the agreement, that these three persons, in carrying on their business of box-makers, had travelled into various parts of the country to vend their boxes and trunks, and had sustained great loss and inconvenience by reason of exercising their trade in the same places. This is the mischief and evil recited in the agreement;—and what is the remedy they propose?

Not a monopoly, except as between themselves; because every other man may come into their districts and vend his goods:—all they propose is, that they shall not carry on a rivalry, nor continue any longer to trade throughout the country. This, then, is only a partial restraint of trade. But, it is said that, admitting that to be so, there is no consideration extrinsic of the agreement itself; and that argument is illustrated by the cases of a master giving up his business to his apprentice or to his journeyman. It strikes me, however, that, in the present case, there is as good a consideration as in either of those alluded to. Each party here, before the agreement is entered into, has a trade in all the districts; and he agrees to retire, and to relinquish that trade in two of those districts, in order to secure the others in undisturbed possession. An objection is then made to that part of the agreement, by which it is stipulated, that, in case other persons shall begin to trade as box-makers in any of the districts, the parties shall meet to devise means to promote their own views. What those means may be, it is unnecessary to surmise; but we cannot presume that they will be illegal; and, therefore, this stipulation does not affect the validity of the agreement.

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HULLOCK, B.—I think this demurrer ought to be disallowed. The question is properly stated, when it is said to be, whether there be a sufficient consideration. It is conceded that there may be an agreement for a partial restraint of trade, provided there be a good consideration. This doctrine is to be found in *Comyns's Digest*, and is laid down in all the cases cited in the argument; and the question is said by Lord *Kenyon*, in *Davis v. Mann* (a), to have been at rest ever since the case of *Mitchell v. Reynolds*. I do not understand the principle upon which it is argued, that there is here no consideration, because it is not extrinsic

(a) 5 East, 120.

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or foreign to the instrument. The law makes no distinction of that kind, but looks whether there is, upon the face of the instrument, a good and valid consideration, that is to say, either a benefit to one party, or a loss to the other. Upon that rule I should say, that, upon the face of this instrument, there is a sufficient consideration. But, it is said, that the effect of this agreement is to create a monopoly; and that, by upholding its validity, we shall lead to other combinations for monopolizing trades. If the brewers or distillers of *London* were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would, perhaps, be, that the public would obtain the articles they deal in at a cheaper rate. Upon the whole, then, I cannot distinguish this case from any of those cited, in which an agreement for a partial restraint of trade has been supported.

VAUGHAN, B.—I am entirely of the same opinion. The only question is, whether there appears upon the face of this agreement a sufficient consideration for the partial restraint of trade it contemplates. In consequence of the loss and inconvenience which it is recited the parties had before sustained, they entered into this agreement, by which the loss and benefit to each is reciprocal. In my opinion, this was an honest and upright contract, which has been the question in all the cases; and a contract by which the public are not injured, as they may be supplied upon easier terms.

Judgment for the plaintiff.

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REVENUE BRANCH.

REX v. MARSH.

(Upon an Extent).

IN *January*, 1829, one *Fearnside* became the purchaser of certain freehold land, the property of the defendant, which was sold under an order of this Court. The particulars of sale set forth the title of the defendant, and stipulated, that the purchaser should be satisfied with an abstract of the title stated; and, amongst others, contained the following condition:—"On the part of the Crown, Mr. *E. Driver* to be at liberty to make one bidding, but no more, and, if highest bidder, the sale to be void."

A rule having been obtained, upon the motion of *Boland*, to confirm the Master's report, in which the above facts were stated, and to confirm the purchase—

Beames shewed cause, upon the ground that a puffer had been employed at the auction by Mr. *Driver*, the agent for the Crown, which, he contended, was sufficient to vitiate the sale. To establish the general rule, as applicable to individuals under such circumstances, he cited the cases of *Bexwell v. Christie* (a), *Bramley v. Act* (b), *Conolly v. Parsons* (c), *Howard v. Castle* (d), and *Meadows v. Tanner* (e); and insisted, that the same doctrine was applicable to transactions in which the Crown was a party, and that a different construction would be injurious to the interests of the Crown, as, in that case, no purchaser would be found.

It appeared, by the affidavits filed on behalf of the Crown, that the purchaser had colluded with the tenant

The employment of a puffer at a sale by auction of property seized under an extent, by an agent of the Crown, to whom a bidding is reserved by the conditions of sale, vitiates the sale.

The misconduct of the purchaser does not preclude him from objecting to the employment of a puffer at a sale by auction.

15. 11. 1829. 359.
16. 2. 1830. 406.

(a) Cowp. 395.

(d) 6 T. R. 642.

(b) 2 Ves. jun. 620.

(e) 5 Madd. 34.

(c) Id. 625.

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in possession, who claimed the property, and had bid, not with a view to become the purchaser, but to obtain an abstract of the title. This was said, by *Clarke* and *Bolland*, to preclude the purchaser from objecting to the mode in which the auction had been conducted, upon the principle that an applicant must come into a Court of equity with clean hands. They further insisted, that there was no fraud, inasmuch as the reserved bidding might have been made at any time; and the biddings of the puffer did not, on the whole, exceed the value of the property. They attempted to distinguish this from the cases which had been cited, by observing, that, in those cases, the auction was to be without reserve.

ALEXANDER, L. C. B.—The objection to this application, as I understand it, is, that the purchaser does not come into Court with clean hands. It is a misapplication of that rule to contend, that it applies to this case. Where the assistance of a Court of equity is required, that Court will not interfere, unless the applicant be free from all imputation of fraud. But that is not the case here, for the applicant does not want the assistance of a Court of equity, but merely, that the rules of law should be applied to his case. Unless, therefore, the misconduct of the party would be a good reason for withholding from him the benefit of the law, the consequence is, that the doctrine which has been relied upon, does not apply; and it being clear, that, in an ordinary case, the employment of a puffer vitiates the sale, and there being no reason why the Crown should be subject to a different construction, this rule must be discharged.

GARROW, B.—The application is not on behalf of the purchaser, but of the Crown, to enforce the contract. Had it been necessary to resort to an action, it must have been shewn, that the contract was entered into; and, as it would

have been a good defence to that action, had it appeared that the contract was fraudulent, it is sufficient to say, it is void upon that ground, now that the Crown seeks to enforce it.

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HULLOCK, B., and VAUGHAN, B., were of the same opinion, and the rule was—

Discharged.

The ATTORNEY-GENERAL v. GIBBS and Others.

(*Upon an Extent*).

THE Sheriff having seized certain property under an extent against *Moody*, a paper-maker, the defendants entered their claim, and pleaded that *Moody* had no greater interest in the goods than as their tenant, and that, subject to that interest, the property was in them. The *Attorney-General* traversed the title of the defendants, and claimed the goods on behalf of the Crown, as utensils for the making of paper, in the custody of *Moody*, being a paper-maker, and indebted to the King for the duties of excise upon paper.

Fixtures demised with a paper-mill, and used by the tenant in the manufacture of paper, are not liable to be seized under an extent for duties upon paper, owing by the tenant to the Crown, as utensils for the making of paper, in the custody of the tenant, under the stat. 34 Geo. 3, c. 20, s. 27.

At the trial, a verdict was found for the Crown, subject to the opinion of the Court, upon the following case:—

Alexander Moody held the paper-mill, in which the goods were seized, with the tackle, utensils, and appurtenances thereto belonging, as tenant to the defendants, by virtue of certain demises to him theretofore made for certain terms of years, not expired at the time of the seizure. The following only of the goods and chattels seized under the extent, were mentioned in the schedule of fixtures annexed to the first of the said leases, *viz.* the water-wheel, two staff chests, and three engines. The other lease, of a subsequent date, was alleged by the defendants to have been lost, and was not produced at the trial. None of the fix-

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tures and articles hereinafter mentioned were the property of *Moody*, otherwise than as tenant of the defendants. The state of the articles in question, when seized, was as follows:

The *presses* were fixed to the ground.

The *heaters* and *pipes*, *copper*, and *furnace*, were fixed to the ground in brick work.

The *stuff chests* were moveable, fixed to wood sleepers with nails, the sleepers being put into the ground, shedded up, and the top of the sleepers being even with the ground.

Pumps and *engines*.—The pumps were shifted on and off as a running gear, and were fixed to the engines, which were fastened to the ground by beams. The engines were used to grind the ropes for paper, by means of iron bars; they communicated with the mills by gearing.

The *wooden shoot* and *wooden trunk*.—The trunk connected the chest, which was fixed to the ground. The shoot was from the engines, lead-pipes, and cocks, fixed to the ground.

Water wheels, *fly wheel*, and *pit wheel*, two *stuff chests*, and three *engines*.—These were mentioned in the schedule of fixtures, attached to the lease.

All the above-mentioned articles were used by *Moody*, the Crown's debtor, for the purpose of making paper; and were, at the time of the extent and seizure, on the demised premises, which were in his possession for that purpose.

The question for the consideration of the Court was, whether the Crown was entitled, by virtue of the statute 34 *Geo. 3*, c. 20, s. 27 (*a*), or any other statute, to all or any of the above-mentioned articles, as utensils for the making of paper, in the custody of *Moody*, being indebted for duties as aforesaid, or whether the defendants were entitled to the same as such lessors as aforesaid, as fixtures attached to the freehold demised to the said *Moody*.

(*a*) See this clause at length in the judgment.

Walton, for the Crown.—The right of the Crown to the articles enumerated in the case is founded upon the statute 34 Geo. 3, c. 20, s. 27; by which, not only the paper itself, but all the materials and utensils for the making thereof in the custody of the maker, are liable for, and chargeable with, the duty upon paper. The question, therefore, is, whether the articles enumerated in the case, and which are there stated to be used in the manufacture of paper, are utensils within the meaning of this statute. It was the object of the Legislature to give an additional security to the Crown; and the reason for that additional security is, that, where insolvency is not apprehended, credit is given by the Crown to the trader: whereas, by law, the Crown may require the duties to be paid immediately upon the paper being made. This regulation is of benefit to the trader, and, consequently, to the landlord also; for the landlord gets a higher rent in proportion to the benefits which the lessee is to derive from the trade to be carried on upon the premises. Now, if such was the intention of the Legislature, it conferred a very poor security to the Crown, if that security was to be confined to the mere loose chattels employed in the manufacture of paper. Utensil, or *utensile*, is defined by *Johnson* to be an instrument for any use (a). But, although this definition, unqualified, may be too large, still, as used by the Legislature, the word “utensil” comprehends every thing, even of the nature of a fixture moveable as between landlord and tenant, or heir or executor, or fixed for the purposes of trade. Every thing which might be moved by the tenant, may, by the provisions of this statute, be seized by the Crown; and, in that view, it is important to ascertain the nature of the articles which may be removed by a tenant. The earliest authority upon this subject is the case 20 H. 7, p. 13, in which it was a question, whether

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(a) The generality of this definition is limited by the instances given: “such as the vessels of a kitchen, or tools of a trade.”

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a furnace, fixed to the freehold with mortar, should go to the executor, or to the heir or owner of the fee, who had put it up; in the judgment of which case the Court laid down the following proposition:—If a lessee for years set up a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation, during the term he may remove them. And so of a baker. And it is no waste to remove such things within the term, by some." In *Poole's* case (a), where certain vats, &c., erected by an under-tenant, a soap-boiler, for the convenience of his trade, had been seized in execution, and the first lessee brought an action against the Sheriff: *Holt*, C. J., held, that, during the term, the soap-boiler might well remove the vats he set up in relation to trade; and said, he might do it by the common law (and not by virtue of any special custom), in favour of trade, and to encourage industry. From this period the right of the tenant to remove trade fixtures may be considered as fairly established; and the subsequent cases have furnished a broad and intelligible principle for the rule, *viz.* the support of the interests of trade, and the encouragement of commerce and manufactures. *Lawton v. Lawton* (b), *Lord Dudley v. Lord Ward* (c), *Lawton v. Salmon* (d), *Penton v. Robart* (e), *Elwes v. Maw* (f). It is unnecessary to enter into a minute examination of the different cases upon this subject, all of which are collected in *Mr. Selwyn's N. P.* (g); for the principle to be deduced from all the authorities upon this subject is, that, although in general, where a lessee, during his term, annexes any thing to the freehold, it is waste if he afterwards take it away; yet exceptions are engrafted upon that rule in favour of trade, and of those vessels and utensils which

(a) 1 Salk. 368.

(b) 3 Atk. 13.

(c) Ambbl. 114.

(d) 1 H. Bl. 259, n. 3 Atk. tures.

16, n.

(e) 2 East, 90.

(f) 3 East, 38.

(g) 1366. See Ferard on Fix-

are immediately subservient to the purposes of trade. This exception furnishes a key to the construction of this act; for that which may be taken by the tenant, the law makes, apparently, his property; and being in his custody for the purposes of trade, it is for this purpose immaterial, whether it be set up by the tenant or by the landlord.

This argument, if well founded, would entitle the Crown to retain all the articles enumerated in the case; but there are some which admit of a different consideration. Some of the articles are found by the case to be moveable, affixed only by running gear; and these, in every sense, must be goods and chattels. Thus, hangings, tapestry, fixtures, the iron backs to chimneys, wainscot fixed by screws, and the like, have been decided to be personalty; and, therefore, removeable by the tenant. *Day v. Austin* (a), *Squire v. Mayer* (b), *Beck v. Rebow* (c), *Harvey v. Harvey* (d), *B. N. P.* 34. So, if a table were put up by the tenant, and fixed by screws to the floor of a house, it would be distrainable, although, in mere technical language, it would be part of the freehold.

The act in question provides, that all things which contribute to the making of paper are to be treated as the property of the paper-maker, so far as the duties are concerned, and are to be liable, equally as if they were his own property. If they were his own property, they would unquestionably be liable, but, as he is the ostensible owner, having the custody for a particular purpose, from which he, and through him his landlord, derives a profit, the act gives him the property for this purpose, and renders such property liable to be seized under an extent.

Holt, contra.—It may be admitted, that these articles would be liable to seizure under an extent, if they were the property of the debtor, not as utensils of trade, but, be-

(a) Cro. Eliz. 374. Ow. 70.

(b) Freem. 249.

(c) 1 P. Wms. 94.

(d) Str. 1141. See *Lee v. Risdon*, 7 Taunt. 191, 2 Saund. 259, n. 11; Ferard on Fixtures.

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cause every description of property, whether real or personal, may be taken under that process. But this point is collateral to the present inquiry, which is, whether the articles in question be or be not utensils within the meaning of the statute; which, from there being no reported decisions upon that point, can only be argued upon the construction of the statute, and by analogy. The object of this proceeding is, to render the goods of the landlord liable for the debt of the tenant, and it would reasonably be expected, that such a liability should be clearly defined. But the popular meaning of the word "utensil" will not confer this right upon the Crown; nor will the most general definition of the word, as given by *Johnson*, "an instrument for any use;" for an instrument is something manual, something used by the hand, as a pail, scythe, shovel, or the like; and a power-loom or machinery, which, although used in one particular trade, is fitted to purposes of general application, cannot be included in that term. Does the statute then clearly define this liability? The object of the Legislature was, to prevent a colorable possession of property by the trader, and to provide against cases in which a colorable title might be set up, by third persons, to property seized by the excise. Looking to the expressions with which the word "utensil" is coupled, it will be found, that the things liable are the commodities which are the subject of the manufacture, the raw material, the preparations, and, lastly, the utensils, all of which are said to be in the custody of the trader, a word inaptly used, if it extend to machinery and things which are part of the freehold. The origin of the present statute will be found to be the 10 *Anne*, c. 19, which, it has been said in some contemporaneous reports, was passed in analogy to the bankrupt laws, an analogy than which none can be more favourable to the Crown. Goods and chattels, which are the words used in the statute of *James*, are certainly more comprehensive than the word utensil: yet those words have uniformly been

holden not to extend to fixtures. Thus, in the case of *Horn v. Baker* (a), it was holden, that stills, fixed to the freehold, did not pass to the assignees, under the words "goods and chattels" in the statute, although vats not fixed to the freehold did pass; and the same was decided in the case of *Storer v. Hunter* (b), with respect to machinery. It is manifest, therefore, that this property could not have passed to the assignees, had the trader become a bankrupt. But, to follow up the analogy, suppose a baker to take a shop, and with it the oven and apparatus for baking, these would not pass to the assignees, nor, by a parity of reasoning, could they be seized under an extent, for they are fixtures, in which he has no actual property. But, supposing the word "utensil," by a latitude of construction, to include these articles; still, if the provisions of the statute can be satisfied, the Court, in favour of trade, are bound to limit that construction. That a contrary decision would be prejudicial to the commercial interests of the country, is obvious to all who are acquainted with the manufacturing districts. The benefits which arise from the leasing of power-looms and every species of machinery, are well known, and the injury which must, of necessity, accrue to that species of traffic, by holding the immense machinery to be liable for the debts of the petty trader, is too obvious to require comment. Now, that the intention of the statute can be satisfied, without straining the meaning of the word "utensil," requires no further confirmation than that which the present case affords; for, beyond the articles mentioned in the case, and upon which this question arises, the schedule to the case contains an enumeration of goods to a large amount, which properly do come within the description of "utensils," and have been seized by the Crown as such, although they are the property of the defendants.

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(a) 9 East, 215.

(b) 5 D. & R. 240, 3 B. & C. 368.

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Walton, in reply.—There is no just analogy between the bankrupt laws and the present statute: the words, and the intention of the Legislature, differ in each. From the possession of fixtures the trader can derive no fictitious credit, for such things are known to be, in most cases, the property of the landlord. But, the object of this statute was, to give a better security to the Crown—an indefeasible lien upon utensils in the possession of the trader—without reference to the actual property. It is admitted, that this indefeasible lien would attach upon these things, had they been erected by the tenant himself; and, as the act says, that the same consequences shall attach upon “utensils” in the custody of the trader, as if, in fact, they had been his property, they are equally liable, though they be the property of the landlord.

Cur. adv. vult.

ALEXANDER, L. C. B.—Now (after stating the pleadings and the case,) delivered the judgment of the Court as follows:—

It will be observed, that the claim on the part of the Crown is for utensils for the making of paper, in the custody of *Moody*. It is not doubted, that the articles in question were in the custody of *Moody*, and were used by him in the making of paper. On the other hand, it is equally undisputed, that they were the property of the defendants, and that *Moody*, the debtor, for whose debt they had been seized, had no interest in them beyond the limits of his term. The title to charge the debt of the lessee upon the property of the lessor is derived, it is said, from the provisions of an act of Parliament. If the act has clearly made the articles in question liable for that debt, the defendants must bear the consequences; but, a clear provision is necessary to make the property of one man liable, without his consent, for the debt of another. The point then is, what has the act done?

The act which has been relied upon as the only material statute, is that of the 34 Geo. 3, c. 20, s. 27, which is in these words:—"And be it further enacted, by the authority aforesaid, that all the paper, pasteboard, millboard, scaleboard, and glazed paper, and all the materials and utensils for the making thereof, in the custody of any maker or makers of paper, pasteboard, millboard, scaleboard, or glazed paper, or of any person or persons, to the use of, or in trust for, any such maker or makers, shall be liable and subject to, and the same, respectively, are hereby made chargeable with, all the debt and duties for paper, pasteboard, millboard, scaleboard, and glazed paper, respectively, made, in arrear and owing by such maker or makers for any paper, pasteboard, millboard, scaleboard, or glazed paper so made by him, her, or them, or in his, her, or their mill, workhouse, warehouse, or other place, and shall also be subject and liable to satisfy all penalties and forfeitures incurred by such maker or makers, or other person or persons using such mill, workhouse, warehouse, or other place, for any offence against this act, relating to the said duties on paper, pasteboard, millboard, scaleboard, or glazed paper, respectively; and it shall and may be lawful, in all such cases, to levy such debts, duties, and penalties, on such paper, pasteboard, millboard, scaleboard, glazed paper, materials, and utensils, or any of them, and to use such proceedings as may lawfully be done, in relation to paper, pasteboard, millboard, scaleboard, or glazed paper, in case the debtors or offenders were the true and lawful owners of the same."

Now, it will be perceived, that the question turns upon the true meaning of the word "utensil," found in this act. What are made liable for the duties, are, the paper, the materials, and utensils, for the making thereof, in the custody of the paper-maker. Whatever comes properly, and without straining the meaning, within these words, however hard it may seem, must be made answerable for the debt.

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The question is, whether the articles enumerated in the case are, or are not, utensils, within the meaning of this clause. No one will say, that they are either paper, or materials for making of paper; but the question arises upon the meaning of the word "utensils." The real controversy is, whether the machinery affixed to the freehold, because employed in the manufacture of paper, is to be treated as a utensil. The natural meaning of that word is extremely remote from any such construction. Nothing, as it appears to me, would justify the putting a construction upon that word, so much more extensive than its common acceptation, except it is made manifest by the context, or by other provisions in the act, that such a construction was intended. The counsel for the Crown have not pointed out to us any word, clause, or provision in this act, or in any other statute *in pari materia*, which has a tendency to support such a proposition. The word used is left to be construed according to its own natural import; which, certainly, does not refer to that which is part of the freehold, or annexed to it. If, adopting a common rule for the construction of all acts of Parliament, and of all written instruments, we look to the context, and to the words which are used together with the word "utensil," we find that these are "paper, pasteboard, millboard, scaleboard, glazed paper, and materials for the making of paper." This is the enumeration with which the word "utensil" is joined in the act. These are all sufficiently loose and floating; and, if the debateable word is to receive a colour and meaning from its associates, it will not be construed to mean water-wheels, and engines affixed to the freehold.

Some cases, by which the right of the tenant to remove that which he has once affixed to the freehold has been enlarged, have been brought to our attention as favourable to the argument of the indefeasible lien of the Crown. In very ancient times, it would have been waste in the tenant to tear from the soil of the freehold what he had once annexed

to it. That rule has been relaxed in favour of manufacturers and commerce. This is established by many cases. Among others, *Poole's* case (a) was cited, in which Lord *Holt* states the rule to be, that the tenant may remove, during the term of his tenancy, that which, during the term, he has joined to the freehold, in matters connected with commerce and manufactures.

I acknowledge the law upon this subject to have been most accurately stated upon the part of the Crown; but, I cannot apply this principle to the present question. I am not able to discover how the right of the tenant to remove, during the term, that part of the freehold which he himself has made part of it, can alter its nature and description, and convert into utensils what, in their own characters, are not utensils, and cannot properly be described as such. I find it still more difficult to apply this reasoning to machinery, not the property of the tenant, and which he never could have any right to remove; but which is the property of the landlord, and part of his freehold estate.

There seems to me no occasion to call in aid the authorities cited by the counsel for the defendants, in which it was held, that fixtures were not goods and chattels in the disposition of a bankrupt, within the statute of *James*. I shall only further say, that, without the aid of this act, the extent will not reach all that is the property of the manufacturer; and that, if its nature and effect be to extend the remedy for duties beyond the goods which are the property of the manufacturer, who is the debtor, it should be done by unequivocal language. That is done here, so far as the effects are properly utensils.

I must now advert to the items:—Some of them are enumerated in the demise as fixtures. It would be very difficult to treat these as mere utensils. I will only say

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(a) 1 Salk. 388.

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very shortly upon the subject of the enumeration of the articles, that the Court is of opinion, that, upon the statement in the case, they appear to be all fixtures, and, therefore, that the Crown has no right to take them under this extent. But the articles are not all so very clearly described as to make the Court quite confident that that is a certain opinion; and, therefore, I am desired to state, that, if the Crown wish to have a reference to the Master upon any of the particular items, in order to have the circumstances, in which they are placed, more specifically described, the Court will give them that opportunity: but, *prima facie*, we consider the articles to be all fixtures.

Judgment for the defendant (a).

(a) At the close of the argument, it appeared from the statement of a gentleman in Court, that the stuff chests moved in a groove, from which they could not be taken without removing the sleepers and unscrewing the groove.

IN THE EXCHEQUER CHAMBER.

(*In Error from the Court of King's Bench*).

CAPEL and Another v. BUSZARD and Others, Assignees
of JONES and Another, Bankrupts.

A., by indenture, demised to B. a certain wharf, adjoining the river Thames, described by

abuttals, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the same belonging; it was found, by a special verdict, that, by this indenture, the exclusive use of the land of the river Thames, opposite to, and in front of, the wharf, between high and low water-mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf; but, that the land itself, between high and low water-mark, was not demised:—Held, that barges of B., lying between high and low water-mark, and attached to the wharf by ropes, could not be distrained for rent of the demised premises, in arrear.

TROVER for two barges. The *first* count of the declaration laid the possession in the bankrupts; and the *second*, in that of the assignees. Plea—Not guilty.

At the trial, before Lord *Tenterden*, the Jury found a verdict for the defendants (the plaintiffs in error) upon the first count; and upon the second, a special verdict, stating, as to the grievances in that count mentioned, that, before and at the time of the making of the distress thereinafter mentioned, *W. R. Jones* and *G. Jones* had become and were bankrupts, and that the plaintiffs (the defendants in error) had been duly nominated, chosen, and appointed, their assignees; that the plaintiffs so being such assignees as aforesaid, before and at the time of the making of the distress hereinafter mentioned to have been made, were lawfully possessed, as of their own property, as such assignees as aforesaid, of the barges hereinafter mentioned to have been taken and distrained by the said defendants. And that, by a certain indenture, bearing date the 9th day of *March*, in the year of our Lord one thousand eight hundred and sixteen, and made before the said *W. R. J.* and *G. J.*, or either of them, became bankrupt, between one *Brown* of the one part, and the said bankrupts of the other part, the said *Brown* demised, leased, and to farm let, unto the bankrupts, all that wharf-ground, and premises next the river *Thames*; and also, all that capital brick-built warehouse, of three floors, erected and built thereon, abutting north on the river *Thames*, east on premises in the occupation of —, south on the street cartway and common highway leading from *Pickle-Herring Stairs* to *Horsley-down Stairs*, and west on the *Five-footway*, or little wharf for landing goods, and certain other premises in the said indenture more particularly mentioned; together with free liberty for them, the bankrupts, their executors, and administrators, during that demise, to land and load goods, wares, and merchandizes, in common with the rest of the tenants of the said *Brown*, at the said *Five-footway* or little wharf, fronting the river *Thames*, together with all cellars, sollars, rooms, chambers, ways, paths, passages, lights, easements, profits, commodities,

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advantages, and appurtenances whatsoever to the said wharf-ground, warehouses, and premises, or any of them, belonging, or in any wise appertaining; to hold the same premises, with their and every of their appurtenances, unto the bankrupts, their executors, administrators, and assigns, from the twenty-fifth day of *March* then last past, for and during and unto the full end and term of thirteen years, at the yearly rent of five hundred and sixty-five pounds, clear of the land-tax and all other taxes, by equal quarterly payments, payable unto the said *Brown* during such part of the said term as he might happen to live, and, from and after his decease, unto the person or persons who, for the time being, should be entitled to the freehold of the premises. The Jury then found, that, by the said indenture, the exclusive use of the land of the river *Thames*, opposite to, and in front of, the said wharf-ground and premises, between high and low water-mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf-ground and premises, but that the said land itself, between high and low water-mark, was not demised; and that before and on the 12th day of *November*, in the year of our Lord one thousand eight hundred and twenty-six, the sum of five hundred and sixty-five pounds of the rent aforesaid was in arrear and unpaid; and that, on that day, and at the time of making the distress hereinafter mentioned, the two barges, the property of the said plaintiffs, as such assignees as aforesaid, were attached by ropes, head and stern, to the wharf-ground aforesaid, and were lying and being on that part of the river *Thames*, opposite to and in front of the said wharf-ground and premises, and between high and low water-mark, the exclusive use of which was demised as aforesaid. And that the said defendants, on the said 12th day of *November*, as the bailiffs of the person who was then entitled to the freehold of the said wharf and premises, and was duly authorized,

by law to distrain for the said arrears, seized and took the said two barges, as and for a distress for the said arrears of rent, and shortly afterwards sold and disposed of the same to satisfy such arrears.

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Upon this state of facts, the Court of *King's Bench* (a) decided, that the plaintiffs (the defendants in error) were entitled to judgment upon the second count of the declaration; because, although it was difficult to understand how the exclusive use of the land could be demised, and the land itself not be demised, in either case the distress could not be supported: if the finding of the Jury meant that the land was demised as appurtenant to the wharf, that finding could not be supported, as, in point of law, one piece of land could not be appurtenant to another piece of land; on the other hand, if it meant that the use and enjoyment of the land merely passed as appurtenant to the wharf, the rent did not issue out of that which was a mere easement, and the distress could only be taken upon that out of which the rent issued. But the contrary having been decided under very similar circumstances by the Court of *Common Pleas*, *Buszard v. Capel* (b), a writ of error was brought to review the decision of the former Court, and was now argued by—

Starr, for the plaintiffs in error.—It is found by the special verdict, that the exclusive use of the land opposite to, and in front of the wharf-ground, where the barges were distrained, was demised as appurtenant to the wharf; and, although it has been said to be difficult to understand how the exclusive use could be demised, and the land not, this finding is intelligible in point of law, and is capable of explanation. “If,” says Lord *Coke* (c), “a man hath twenty acres of land, and by deed granteth to ano-

(a) 2 M. & R. 197; 8 B. & C. 141.

(b) 4 Bing. 137.

(c) Co. Lit. 4 b.

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ther and his heirs *vesturam terræ*, and maketh livery of seisin *secundum formam cartæ*, the land itself shall not pass, because he hath a particular right in the land; for, thereby, he shall not have the houses, timber-trees, mines, and other real things, parcel of the inheritance, but he shall have the vesture of the land, that is, the corn, grass, underwood, sweepage, and the like; and he shall have an action of trespass *quare clausum fregit*." Again,—"But, if a man take a lease of the herbage of his own land, by deed indented, this is no conclusion to say that the lessor had nothing in the land, because it was not made of the land itself (a)." The use so found is inferred from acts of enjoyment, of which the land was capable, such as making beds for the barges, clearing out the mud, and the like; it is, in effect, the same as a grant *vesturæ terræ*; and the two cases may, with propriety, be assimilated. But it must be shewn, that the exclusive use so found, is of a nature which may be appurtenant to the principal subject of demise; for it has also been said, that, if the meaning of the finding be, that the land itself was demised as appurtenant to the wharf, it would amount to a finding, that one piece of land was appurtenant to another, which, in point of law, cannot be. To a certain extent, this proposition may be conceded; for, one piece of land, in which there is an interest from the surface to the centre, cannot be held as appurtenant to another piece of land similarly circumstanced: but, to the full extent, this proposition is not sustainable; for, although the technical rule is, that a thing corporeal cannot be appendant to a thing corporeal, or a thing incorporeal to a thing incorporeal, this proposition is not universally true. In *Co. Lit.* 121 b, it is said, that prescription doth not make any thing appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature

(a) *Co. Lit.* 47 b.

to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, or a thing incorporeal to a thing incorporeal. But, in a note to this passage, Mr. *Butler* says, —“The true test seems to be, the propriety of relation between the principal and the adjunct, which may be found out by considering, whether they so agree in nature and quality, as to be capable of union without any incongruity.” The exclusive use here found is not the land, but the use of the land, which may well be granted, although the land itself do not pass: this is the adjunct, the principal is the wharf. They agree in nature and quality, and are capable of union without any incongruity.

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If, then, the exclusive use so found may be appurtenant to the land demised, is it an interest, substantial and tangible, whereto a lessor may resort to distrain? In the first place, it is an interest, for the recovery of which an assize of *novel disseisin* would lie at common law. Thus, *Bracton*, *De assisa novæ disseysinæ*, lib. 4, cap. 6, f. 124, says: “*Locum autem non solum habet hujusmodi assisa in rebus corporalibus, sicut in tenementis quibuscunque; verum etiam in rebus incorporalibus, sicut in servitutibus, et in rebus quæ pertinent ad tenementum, sicut in jure pascendi, falcandi, fodiendi, et hujusmodi.*” And again, *Id.* cap. 14, f. 176, “*In quibus casibus omnibus subvenitur disseysito per breve de ingressu, secundum formas inferius notandas, tam super possessionibus rerum corporalium, quam super juribus scilicet rebus incorporalibus, sicut jure pascendi, et hujusmodi utendi fruendi.*” So, we have the authority of Lord Coke (a) that, at common law, an assize of *novel disseisin* would lie in such cases; for, in his commentary upon the statute *Westminster 2*, by which the remedy by assize of *novel disseisin* was extended, after noticing the authority of *Bracton*, he observes: “And in this reign of *Henry 3rd*, which was before the making of this act, an

(a) 2 Inst. 412.

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assize did lie of a common of piscary; and those opinions had great probability of reason: yet, because (as hath been said) there was no writ in the register in these cases, therefore, before this act, no writ did lie, by the general opinion of the judges; but now this act hath cleared the question." Now, an assize of *novel disseisin* is a writ of entry, wherein *A.* complains that *B.* has disseised him of his freehold, and the sheriff is to cause that tenement to be re-seised, and twelve men to view that tenement, (*F. N. B.* 177); it is a remedy which exists only where the *jus utendi* is capable of being defined, and lies not where the complainant cannot describe his tenement, either in quality, or by quantity, or local situation. (*Bracton, De assisa novæ disseysinæ*, lib. 4, cap. 16, f. 181.) But there can be no better test that this is an interest tangible, substantial, and maynorable, than that it may be made the subject of an action of trespass *quare clausum fregit*. By a grant *vesturæ terræ*, though the land itself do not pass, the grantee shall have an action of trespass *quare clausum fregit*.—*Co. Lit.* 4 b. In *Wilson v. Mackreth* (*a*), where the plaintiff had an exclusive right to dig turf on the soil of the lord, it was holden, that trespass would lie for digging the turf there, though the plaintiff had not the absolute right to the soil. If the interest of the plaintiff had been a mere right of common of turbary, trespass *quare clausum fregit* would not have been maintainable; but, it was an exclusive right, as this is, to the enjoyment of land, which, as *Wilmot, J.*, in that case, observes, does not necessarily import, that the grantee should have the whole property to the land. Common and exclusive rights are thus distinguished by Lord Coke (*b*):—"If a man prescribe for common in the land of another, to the exclusion of the owner, it is bad; but a man may prescribe or allege a custom to have *separalem pasturam*, and exclude the

(*a*) 3 Bur. 1824.

(*b*) *Co. Lit.* 122.

owner of the soil from feeding there; or, *solam vesturam terræ* from such a day to such a day, and thereby the owner of the soil shall be excluded from pasturing or feeding there; or, *separalem piscariam*, and the owner of the soil shall be excluded from fishing there; but, if he claim to have *communiam piscariæ*, or *liberam piscariam*, the owner of the soil shall fish there. Even where there are conflicting rights, as between the lord and copyholders, the latter may have the sole and several pasture in the soil of the lord, and exclude him; *Hoskins v. Robins* (a); *a fortiori*, therefore, where no right conflicts but that of the king, who, as *parens patriæ*, is owner of the soil, the use here found must be a tangible and substantial interest, which may form the subject of an action of trespass *quare clausum fregit*, and whereto a lessor may resort to distrain.

Now, if the use found may be appurtenant, and is tangible, it remains to shew, that it is an interest whereto a lessor may resort to distrain, though the land itself be not demised. A mere privilege or easement is totally dissimilar from an exclusive use. "If a man deviseth the vesture and herbage of his land, he may reserve à rent, for that the thing is maynorable; and the lessor may distrain the cattle upon the land." *Co. Lit.*, 47 a. And, in *Welch v. Myers* (b), where replevin was brought for taking eight cows as a distress, and the tenant had no greater interest than the use here found, for he was lessee of the vesture for a limited period only, and had no absolute interest in the land, it was not doubted but that a distress might well be taken. The doctrine of distress is said to have originated in the *Roman Law*, to the pignorary method of which the rigour of the ancient feudal forfeitures was mitigated; but it is not precisely stated in any work, whether a distress may be taken for the rent of a common. The *dictum* of Lord Coke, upon this subject, is repeated

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(a) 2 Saund. 324.

(b) 4 Camp. 368.

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in the text books, and the provisions of the statute 11 Geo. 2, c. 19, s. 8, are referred to for the purpose of shewing that it cannot; but the words of that statute are extremely general, capable of comprising as well incorporeal as corporeal rights; and it does not follow, because this is said to be a new enactment, that there may not have been a power of trespass before. Indeed, the power of distress is incident and inseparable from rent-service; and distress for rent-service not being against common right, the Court will afford every assistance to the exercise of that right. To the exercise of this power there are no stricter limits than the following, which are given by *Fleta*, lib. 2, c. 49:—" *In qualibet captionem tria principaliter requiruntur, certus locus, certa causa, et seiscina alicujus.*" In the present case, these requisites concur: the use is exclusive, and, therefore, the place is certain; the *causa certa* is the rent in arrear; and the tenant is seised, for, even the owner of a mere easement is always stated in pleading to be seised as of fee. *Littleton* does not confine the remedy by distress to land, but says, sect. 58:—" If the lessor reserved to him a yearly rent upon such lease, he may chuse for to distrain for the rent in the tenement letten, or he may have an action of debt for the arrearages against the lessee." Within the word "tenement," this use may be included; and, although Lord *Coke*, in commenting upon this passage, says, the rents must be reserved out of the lands or tenements, whereunto the lessor may have resort to distrain; and, afterwards, proceeds to state, that a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, &c.; but, if lease be made of them by deed, for years, it may be good, by way of contract, to have an action of debt, but distrain, the lessor cannot;—it is sufficient to say, that this does not come within any of the instances put by Lord *Coke*, but is an exclusive use, as found by the Jury. Unless the present distress be

supported, the remedy by distress is, in this case, absolutely lost; for the tenant may remove his goods to the barges on the river, and, unless the removal be clandestine, the landlord cannot follow the goods, though they be removed for the mere purpose of avoiding the distress (a). On the other hand, by sustaining this distress, no injury can ensue: the rights of the landlord will be protected, but without prejudice to the interests of third persons; for goods sent to a wharf are excepted from the landlord's right to distrain, upon the grounds of public convenience. *Gilman v. Elton* (b).

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Richards, for the defendants in error.—The real question is, whether the place in which the barges were distrained is part and parcel of the premises demised, or whether it was used as a mere easement; for, if it be an easement, the distress cannot be sustained, and the judgment must be affirmed. The rule upon this subject is thus laid down by Lord Coke:—"First, it appeareth here, by *Littleton*, that a rent must be reserved out of lands or tenements, whereunto the lessor may have resort or recourse to distrain, as *Littleton* here also saith; and, therefore, a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodies, mulcture of a mill, tythes, fayres, markets, liberties, privileges, franchises, and the like. But if a lease be made of them by deed, for years, it may be good, by way of contract, to have an action of debt, but distrain, the lessor cannot." *Co. Lit.* 47 a. The statute 11 Geo. 2, c. 19, s. 8, enables the landlord to distrain any

(a) *Watson v. Main*, 3 Esp. 15; but see *Opperman v. Smith*, 4 D. & R. 33; *Bach v. Meats*, 5 M. & S. 200; *Stanley v. Wharter*, 9 Price, 301; *Lyster v. Brown*, 1 Car. & P. 121, in which this case is over-ruled.

(b) 3 B. & B. 82. He also re-

ferred the Court, generally, to his argument in the Court of K. B., but did not cite the cases of *Bally v. Wells*, 1 Wils. 25; 26 H. 8, f. 5, pl. 20; *Gray's case*, 5 Co. 78 b, Cro. Eliz. 405; the Mayor of *Northampton v. Ward*, 1 Wilson, 107, 115; and *Watson v. Main*, 3 Esp. 15.

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cattle feeding upon any common appendant to the land demised. This statute, which is intitled, "An act for the more effectual securing the payment of rents, and preventing fraud by tenants," gives a new remedy; for, at common law, such cattle could not be distrained, because the common was only accessory, the soil of the common being in the lord of the fee, and the lessor of the land could not enter upon the common to distrain. Now, the indenture of demise set out in the special verdict, defines the property demised by abuttals, not including the place in question; it also contains general words, to which alone the finding of the Jury can be referred. That finding is, that the exclusive use of the land was demised as appurtenant to the wharf, but that the land itself was not demised; which latter part distinguishes this from the case of *Buszard v. Capel* (a), in the Court of Common Pleas. Land cannot be appurtenant to land, and, therefore, if the land itself did not pass, but the exclusive use of the land only, that use must pass as an easement under the word "appurtenances" in the lease. The rent issues out of the land itself, and not out of the easement; and, as the distress can only be taken from that from which the rent issues, it cannot be taken upon the easement.

Starr, in reply.—The present does not come within any of the instances mentioned by Lord *Coke* in the passage referred to, out of which a rent cannot be reserved. The nearest to which it may be assimilated is a privilege; it is, however, not a privilege, but an interest in the soil: superficial it may be, but it is still tangible, and such whereto a lessor may resort to distrain. A demise for the exclusive use of soil for barges, is an interest precisely similar to a demise *vesturae terræ*.

Cur. ado. vult.

(a) 4 Bingh. 137.

ALEXANDER, L. C. B.—This is an action of trover for two barges, brought by the assignees of bankrupts of the name of *Jones*, against two defendants, who were bailiffs, duly authorized, of the person then entitled to the freehold of a wharf and premises in possession of the defendants in error, the assignees, and who had seized the two barges, under colour of distress, for rent-arrear.

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The distress was made upon two barges lying in the river *Thames*, but attached by ropes to the wharf demised by the principal of these bailiffs, the plaintiffs in error, to the bankrupt, now represented by the assignees. The question is, whether the distress is valid. There is no doubt that the wharf was demised, that rent was in arrear, and the distress made. The controversy is, whether the barges were in a position which rendered them liable to be distrained upon.

It is necessary to examine the terms of the demise, to determine the nature of the interest which the tenant took under the demise in the place where the barges were at the time of the distress, and then to decide, whether, by law, property in that place was liable to be distrained upon. The Jury found a special verdict, where the terms of the demise are stated. In substance, they are as follows:—By indenture, *Brown* demised to the bankrupts all that wharf ground and premises next the river *Thames*, and also, that warehouse abutting north on the *Thames*, &c., together with licence for them, during that demise, to land and load goods, in common with the rest of the lessor's tenants, at Five-foot-way wharf; together with all easements and appurtenances to the said wharf and premises belonging or appertaining:—the special verdict then stated, that, by the indenture, the exclusive use of the land of the river *Thames*, opposite to, and in front of the demised wharf, between high and low water-mark, as well when covered with water as dry, was demised as appurtenant to the wharf; but that the land between high

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and low water-mark was not demised. It has been observed that the special verdict is, in this place, erroneous, and inconsistent with itself. It finds that the exclusive use of the land over which the river flows was demised as appurtenant to the wharf, but that the land itself was not demised. This inconsistency has suggested to one of the Judges the propriety of a *venire de novo*. It is agreed, that the finding is inconsistent, because a grant of the exclusive use of the land is a grant of the land. Therefore, the verdict finds that the land was demised, and that it was not demised. But, still, the majority of the Judges are of opinion that there is no occasion for a *venire de novo*; such a step would, in their opinion, occasion useless delay and expense. The Jury have put a construction upon the instrument. The instrument is itself sufficiently set out upon the special verdict, and the Court can judge of its legal effect. They are now informed as exactly what the facts are, as they could be by any amendment, and, therefore, do not deem it necessary that there should be a *venire de novo*. The special verdict then proceeds:—"That, on the 12th November, 1826, the sum of 555*l.* of the ~~rent~~ was in arrear, and unpaid; and that, on that day, and at the time of making the distress thereafter mentioned, the two barges, the property of the plaintiffs as such assignees, were attached by ropes, head and stern, to the wharf-grounds aforesaid, and were lying and being on the part of the river *Thames* opposite to and in front of the said wharf-ground and premises, and between high and low water-mark, the exclusive use of which was demised, as aforesaid; that the defendants, on the said 12th of *November*, as the bailiffs of the person who was then entitled to the freehold of the wharf and premises, and was duly authorized by law to distrain for the arrears, seized and took the two barges as a distress for the arrears of rent, and, shortly afterwards, sold and disposed thereof, to satisfy such arrears." Such is the ver-

dict. Nothing is demised but the wharf-ground and premises next the river *Thames*, and the capital built brick warehouse of three floors, erected and built thereon, together with the cellars, sollars, rooms, chambers, ways, paths, passages, lights, easements, profits, commodities, advantages, and appurtenances whatsoever, to the said wharf-ground, warehouse, and premises, belonging or appertaining. What is demised, therefore, is the wharf-ground, and premises next the river, the warehouse, and the easements and appurtenances thereto belonging. The Jury tell us that it was as appurtenant that the exclusive right to the use of the land in question, over which the barges were moored, passed to the lessee. As it is an acknowledged rule, that land cannot be appurtenant to land, it follows that the Jury drew a right inference from the deed, when they found that the land itself between high and low water-mark was not demised; and when they say, that the exclusive use of the land was demised for the accommodation of the tenants of the wharf, they do not mean exclusive use in the sense which those words import, when they are held to pass the land itself. That would be contrary both to their own express finding, and to the manifest construction of the deed itself, set out upon the record. It may be assumed as a fact, therefore, that the land over which the barges were moored was not demised, though the land to which they were attached was demised. The question, then, comes to be, whether, by law, a distress can be made upon property situated upon land which is not parcel of the demise — land, of which the tenant has, at most, an easement.

It cannot be denied that the law is generally understood to be as laid down by the Lord Chief Baron *Comyns* in his *Digest*, title *Distress*, A. 3, that, for rent reserved upon a lease, a man may distrain upon any part of the land out of which the rent issues, evidently implying a negative, that he can distrain nowhere else. It would,

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surely, be vain to contend, that the rent issued out of the soil of this navigable river. Much ancient learning has been ingeniously brought into action upon this occasion, to prove that a distress may be taken upon an easement, or a right analogous to what the tenants are supposed to have had upon the river in this case. But none of the cases cited, when examined, warrant the proposition. The total absence of all clear and direct authority upon such a point is, I think, decisive against it. I do not think it necessary to examine the *dicta* and cases which have been mentioned, in order to shew that they fail in establishing the proposition for which they have been cited. The exceptions to the rule, that the distress must be upon the land, whether they are found in the common law, or introduced by statute, all prove the rule. The right of the lord to follow when the cattle are removed within his sight, when it is stated by my Lord *Coke* in the 1st *Inst.* 161, is put upon this, that, in judgment of law, they are at the time within his fee. The statute of *Anne* affording a remedy where the goods are carried off clandestinely; the statute of *Geo. 2*, authorizing the landlord to distrain cattle feeding upon commons appurtenant to the land demised; all these exceptions prove the rule, that the distress must be made upon land out of which the right of the landlord issues. There is no reason in justice for extending, by subtlety, the right of distraining, beyond what the ancient law of the realm has established. If the law were as contended by the plaintiffs in error, the barges of a stranger, moored there for a temporary purpose, with their cargoes, might be seized, which would be unjust. It has been said, that a decision, that the right of distraining does not exist upon property situated as these barges were, would be dangerous to the commercial interests of the country: I am not able to discover the danger. The landlord will have his remedy by distress upon the premises really demised, and will have, besides,

his remedy upon the contract. If it be supposed that, because the soil of the river cannot be demised by the owner of the adjoining wharf, the easement or privilege of attaching their barges to the adjoining wharf would be in danger, I must say, I cannot discover the consequence. If this be an easement, as they say it is, to the benefit of which they are entitled, the law has the means of protecting men in their easements appurtenant to their lands, as well as in the lands themselves. We are of opinion, that the judgment should be affirmed.

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I am desired to state, that the late Chief Justice of the *Common Pleas*, who heard the case argued, does not concur in the opinion I have delivered, but thinks that the judgment ought to be reversed; the majority, however, of the Judges are of opinion that it ought to be affirmed; and let it be affirmed accordingly.

Judgment affirmed.

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EXCHEQUER CHAMBER IN EQUITY.

June 16, 23. HENEAGE and Others v. Lord ANDOVER and Others.

A testatrix devised certain estates to trustees for a term of five hundred years, and, subject to the term, and the trusts thereof thereafter declared, she devised the same estates to the use of various persons successively for life; with remainder to the first and other sons of such several persons successively in tail male; with remainder to the daughters of such several persons, successively in tail general; with remainders over.

The trusts of the five hundred

years' term were declared to be, that the trustees of the term should, out of the rents and profits of the hereditaments comprised in the said term, pay the several annuities mentioned in the will, and, subject thereto, should, out of the residue of the rents and profits of the premises comprised in the said term, levy and raise such sums of money, not exceeding 8,000*l.* in the whole, as should be necessary to pay and satisfy such debts or sums of money as might be due and owing by her late husband, or by herself, either by mortgage, bond, or otherwise; and all which she directed the trustees to pay, satisfy, and discharge out of the said rents and profits, in such manner and form as they should think fit, and as soon as conveniently might be after her decease; and subject and without prejudice to the several trusts declared of the said term, upon trust to pay and apply the residue and overplus of the net rents, issues, and profits of the premises comprised in the said five hundred years' term, unto the person or persons who, for the time being, should be next entitled to the reversion or remainder of the premises, expectant on the said term, under the limitations thereinbefore contained:—*Held*, that it was a question of intention, to be collected from the provisions of the will, whether the testatrix meant to charge the debts upon the *corpus* of the estate, or only to direct the payment out of the *annual* rents and profits; and, upon the several provisions, the Court held, that the testatrix did not intend that the debts should be raised out of the *corpus* of the estate, but only that the same should be discharged out of the annual rents and profits.

Though, in favour of creditors, the Court considers a devise in trust for payment of debts out of rents and profits, to be equivalent to a devise of the estate itself in trust for payment of debts, and will direct the estate to be sold for that purpose, yet it has been in cases where the remainder-man was either tenant in fee or in tail, and, therefore, liable to pay the debts sooner or later.

JOHN Walker Heneage, by his will, dated 17th March, 1798, after charging all and singular his real estates with payment of his just debts, gave and devised all his real estates in *Great Britain*, to his wife, *Arabella Walker Heneage*, to hold the same unto her, her heirs, and assigns, for ever; and he gave to the said *Arabella Walker Heneage*, her executors, administrators, and assigns, all his personal estate of what nature or kind soever; and the said testator appointed the said *Arabella Walker Heneage* sole executrix of his said will. The said *Arabella Walker Heneage*, by her will, dated the 25th May, 1813, gave and devised all her manors, messuages, lands, and hereditaments in *Wilts, Berks, Somerset, Middlesex, and Surrey*, and all other her real estates, to the Right Honourable *Charles Meadows Pierrepont*, Earl of *Manvers*, the Right Honourable *Thomas Howard*, Lord Viscount *Andover*,

and the Right Honourable *Charles Pierrepont*, then Lord Viscount *Newark*, and their heirs, to the use of *Robert Nicholas* and *George Wyld*, their executors, administrators, and assigns, for five hundred years, to commence from the time of the said testatrix's decease, without impeachment of waste, but upon the trusts nevertheless thereafter declared; and, from the end or other sooner determination of the said term of five hundred years, and, in the meantime, subject thereto, and to the trusts thereof, to the use of the plaintiff, *George Heneage Walker Heneage*, and his assigns, for his life, with remainder to the said Earl of *Manvers*, Viscount *Andover*, and Viscount *Newark*, and their heirs, during the life of the said *George Heneage Walker Heneage*, in trust, to preserve contingent remainders; and after the decease of the said *George Heneage Walker Heneage*, to the use of the first, second, and every other the son and sons of the body of the said *George Heneage Walker Heneage*, lawfully to be begotten in tail male; with remainder to the plaintiff, *Thomas John Wyld*, and his assigns, for his life; with remainder to his first and other sons in tail male; with remainder to the plaintiff, *William Thomas Wyld*, for his life; with remainder to his first and other sons in tail male; with remainder to *James William Wyld*, since deceased, for life; with remainder to his first and other sons in tail male; with remainder to the fifth and sixth, and every other son of *George Wyld*, by *Mary Dionysia*, his wife, in tail male; with remainder to the use of the first and every other son of the plaintiff, *George Heneage Walker Heneage*, in tail male; with like remainder to the sons of his brothers; with remainder to the daughters of the said *George Heneage Walker Heneage*, severally and successively, in tail general; and, for default of such issue, to the use of the daughters of his said brothers in tail general, with the ultimate remainder to the plaintiff, *Francis John St. Quintin*, his heirs and assigns, for ever.

The term of five hundred years was declared to be

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1 Coll: 581.

3 Ex & Ch. 240
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limited in use to the said *Robert Nicholas* and *George Wyld*, their executors, administrators, and assigns, as aforesaid, upon trust that they should, out of the rents and profits of the hereditaments and premises comprised in the said term, pay to the defendant, *Arabella Anne Caroline Jenny Pigott*, the clear net sum of 500*l.*, free from the legacy-duty and all deductions, to be paid her as soon as conveniently might be after the said testatrix's decease; and should also pay the sum of 700*l.* (the like sum having been expended by her, the said testatrix, in renewing a copyhold estate in *Cherhill*, in the said county of *Wilts*, held under Mr. *Grub*) unto her executors thereafter named, to be applied by them upon the trusts thereafter declared concerning her residuary personal estate; and upon further trust, during the life of the said *Arabella Anne Caroline Jenny Pigott*, in case she should continue unmarried, by and out of the rents, issues, and profits of the several manors and other hereditaments and premises comprised in the said term of five hundred years, or any of them, to levy and raise the clear yearly sum of 1,000*l.* of lawful money, free from legacy-duty, land-tax, and all other taxes and deductions; and should pay, apply, and dispose of such yearly sum of 1,000*l.* by equal half-yearly payments into her proper hands, in manner therein mentioned; and, in like manner, to levy and raise the several other annuities therein mentioned; and subject to the several trusts and directions therein declared and hereinbefore mentioned, of the said term of five hundred years, upon further trust; and the testatrix directed, that the said trustees should, out of the residue of the rents, issues, and profits of the hereditaments and premises comprised in the said term of five hundred years, levy and raise all such sum and sums of money not exceeding, in the whole, the sum of 8,000*l.*, as should be necessary to satisfy, pay, and discharge all such debts and principal sums of money, and interest due thereon, as might be justly due and owing by the said testatrix's late husband, *John Walker Heneage*, in his lifetime, or by

herself, either by mortgage, bond, simple contract, or otherwise; all which she directed the said *Robert Nicholas* and *George Wyld*, and the survivor of them, or the executors and administrators of such survivor, to pay, satisfy, and discharge, out of the said rents and profits, not exceeding the said sum of 8,000*l.*, in such manner, proportions, and form, as they should think fit, and as soon as conveniently might be after her decease; and subject and without prejudice to the several trusts and directions thereinbefore declared and mentioned, of and concerning the said term of five hundred years, upon trust; and she directed, that the said trustees should pay and apply the residue and overplus of the net rents, issues, and profits of the premises comprised in the said term of five hundred years, unto, or permit and suffer the same to be received and taken by, or for the benefit of the person or persons respectively, who, for the time being, should be next entitled to the reversion or remainder of the said premises, expectant on the said term of five hundred years, under or by virtue of the limitations before contained. And the said testatrix thereby directed, that when all and every the trusts and purposes thereby declared and directed of the said term of five hundred years, should, in all things, be fully performed and satisfied, or should be discharged, either by becoming unnecessary, or by being incapable of being performed, or by any other means; and when the said *Robert Nicholas* and *George Wyld*, and each of them, their and each of their executors and administrators, should be reimbursed and satisfied all charges and expenses occasioned by or relating to the trusts thereby in them reposed, then the same term of five hundred years should cease and determine, and be utterly void. And the said testatrix declared her will and mind to be, that, after satisfaction of the trusts therein and hereinbefore mentioned of the said term, so far as related to the payment of debts, if the person or persons, for the time being entitled to an estate for life in the hereditaments

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hereinbefore devised in settlement by the said will, should be under the age of twenty-one years, then, during his or their minority, the said Earl of *Manvers*, Viscount *Andover*, and Viscount *Newark*, should enter into and hold possession of the said manors and other hereditaments, and receive and take the rents, issues, and annual proceeds and profits, and out of the same apply any annual sum or sums of money, according to the age or respective ages of such minor or minors respectively, but not, at any one period, exceeding the yearly sum of 800*l.*, for or towards the maintenance or education of such minor or minors respectively, and, subject thereto, lay out and invest the said yearly rents, issues, and profits, or the surplus thereof, in manner therein mentioned. And the testatrix declared her will and mind to be, that they the said trustees should be possessed of and interested in the said stocks, funds, and securities, interests, dividends, and annual produce, and the accumulations respectively, upon trust, at the end of such minority, or sooner, if they should think proper, to call in or dispose of the same, and convert them into money, and lay out and invest the money to arise and be produced, as last mentioned, in the purchase of freehold estates of inheritance, to be situate in the county of *Wilts*, and should settle and assure the same to the uses to which the manors and other hereditaments, from the rents and profits of which the accumulations should have been respectively produced, should, by virtue of the said will, then stand limited and settled. And the said testatrix, after making certain specific bequests and legacies, gave and bequeathed to the said trustees, the sum of 2,415*l.* 4*s.* Three *per cent.* Bank Annuities, then standing in the name of the Accountant-General of the Court of *Chancery*, in trust, to permit the dividends for ever to be received by or for the benefit of the person or persons respectively, who, for the time being, should be in possession of her said estate and premises, by virtue of the limitations thereinbefore contained.

And the said testatrix gave and bequeathed the residue of her money, stocks, funds, and all other her personal estate, to the said Viscount *Andover*, *Robert Nicholas*, and *George Wyld*, upon trust for the person therein mentioned. And the said testatrix appointed the said Lord Viscount *Andover*, *Robert Nicholas*, and *George Wyld*, executors of her said will.

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By a codicil, dated the 9th *April*, 1815, after reciting, that, since the making her will, she had purchased from *Robert Maundrell*, Esq., a freehold estate in *Compton Bassett*, then in the occupation of *Clare Flower*, for 2,555*l.* she thereby gave and devised the same unto and to the use of Sir *Jonathan Cope*, Bart., and *Edward Goddard* Clerk, their heirs and assigns, for ever, upon trust, nevertheless, immediately after her decease, to offer the same, together with the timber thereon growing, unto the Earl of *Manvers*, Viscount *Andover*, and *Robert Nicholas*, to be by them purchased for the sum of 2,627*l.*; and her will was, that in case the said Earl, Viscount, and *Robert Nicholas* should be desirous of purchasing the hereditaments and premises at the said sum of 2,627*l.*, that the said Sir *Jonathan Cope* and *Edward Goddard* should convey and assure the said hereditaments unto and to the use of the said Earl, Viscount, and *Robert Nicholas*, for ever, upon the trusts, nevertheless, and subject to the like restrictions as were declared and directed in her said will, concerning her manors, capital and other messuages, lands, and hereditaments, in her said will devised unto the said Earl, Viscount, and *Robert Nicholas*, and their heirs, upon trust for the immediate benefit of the plaintiff, and his issue in tail male, and the several other persons in the limitations of her said will mentioned: and the said testatrix thereby authorized and empowered the said Earl, Viscount, and *Robert Nicholas*, from and out of the rents, issues, and profits of all and singular her real estates, to raise and advance the said sum of 2,627*l.* for the purchase of the said hereditaments and premises, to be settled and conveyed to them in manner aforesaid.

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By another codicil, dated the 27th *April*, 1816, the testatrix revoked the appointment of *George Wyld* as a trustee and executor, and in his stead appointed the defendant *Edward Goddard*; and she also appointed the said *Edward Goddard* a joint executor of her will (instead of the said *George Wyld*), together with the said Lord Viscount *Andover* and *Robert Nicholas*.

The testatrix died about the 26th *June*, 1818.

The Earl of *Manvers* died in the lifetime of the testatrix, and the said *Charles Pierrepont* Viscount *Newark* thereupon succeeded to the title of Earl of *Manvers*; he, however, did not in any manner act in the trusts of the will and codicils, but renounced and disclaimed the same; and Viscount *Andover*, *Robert Nicholas*, and *Edward Goddard*, after the death of the said testatrix, duly proved the said will and codicils in the Prerogative Court of the Archbishop of *Canterbury*.

The suit was instituted for the purpose of taking the usual accounts, and obtaining the opinion of the Court on the construction of the will of the testatrix.

By the decree made on the hearing of the cause, dated the 12th day of *June*, 1820, it was declared, that the will and codicil of *John Walker Heneage*, and the will and codicils of *Arabella Walker Heneage* were well proved; and it was referred to the Deputy Remembrancer to make various inquiries, as to who were the heirs-at-law and next of kin of the said testator and testatrix.

In pursuance of the decree and the general order of transfer, *Jefferies Spranger*, Esq., one of the Masters of the said Court, made his report, dated the 25th day of *May*, 1821. By a decree on further direction, dated the 23rd *May*, 1822, it was declared, that the plaintiff *George Heneage Walker Heneage* was entitled to an estate for life in such parts of the real estates of the testator *John Walker Heneage* as were unsold and undisposed of by the testatrix *Arabella Walker Heneage* in her lifetime, devised to him by the will and codicils of the testatrix, subject to

the term of five hundred years, vested in the defendants *Robert Nicholas* and *Edward Goddard*, with such limitations over as were contained in the will of the testatrix; and that the plaintiff *George Heneage Walker Heneage* was also entitled in like manner to all the real estates of the testatrix of which she was seised at the several times of making her will and codicils, and of her death, and which were devised to him by her said will and codicils, subject to and with such limitations over as aforesaid. And it was referred to the said Master to take the several accounts therein directed.

The Master made his report, bearing date the 1st day of *May*, 1827.

By a subsequent decree, made on further directions, dated 27th *June*, 1827, it was ordered, that the report should be confirmed; and that it should be referred to the Master, to compute what part of the debts of the testator *John Walker Heneage*, and of the testatrix *Arabella Walker Heneage*, were then due, and which were specified in the said report, as composed of interest, which had accrued due during the time the plaintiff *George Heneage Walker Heneage* had been entitled to the rents and profits of the estates in question; and the Court declared, that such part of the interest which had so accrued, ought to be paid out of the fund in Court, arising from rents and profits; and that the surplus of the said debt, including the sum of 150*l.* and interest, due to *William Chivers*, and secured by the promissory note of the testatrix, bearing date the 8th *February*, 1814, not exceeding 8,000*l.*, ought to be paid out of the same fund: and, without prejudice to the said inquiry, it was ordered by the Court, that the Accountant-General should sell the sum of 12,154*l.* 7*s.* 5*d.* Bank 3*l.* *per cent.* Reduced Annuities, standing in his name, to the credit of this cause, to an account, intitled, “the real estates,” which had arisen from such rents and profits; and that, out of the monies which should arise by such sale, the said Accountant-General

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should pay to the several persons named in the third schedule to the report, and also to the said *William Chivers*, the several sums so reported due to them respectively, and should pay the balance of the money, to be produced by the said sale, to the plaintiff *George Heneage Walker Heneage*, he undertaking to pay thereout the subsequent interest on the said debts.

The plaintiff *G. H. W. Heneage* applied for a re-hearing of the cause, and a variation of so much of the last-mentioned devise as is above stated, on the following among other grounds, *viz.* that the charges of 500*l.* and 700*l.*, and the amount of the debts, not exceeding 8,000*l.*, due from the testator *John Walker Heneage*, and the testatrix *Arabella Walker Heneage*, ought to be raised by sale or mortgage of a sufficient part of the estates in the pleadings mentioned; and that the interest only on those debts ought to be paid out of the rents and profits of those estates accrued due since the death of the said testatrix; or, if the Court should not be of this opinion, then, that the whole of the rents and profits accrued due during the minority of the plaintiff ought to be applied, so far as the same would extend, in payment of such debts and the interest thereon, and not, as provided by the decree, that the interest only on those debts, during that period, should be paid out of such rents and profits.

Mr. *Treslove* and Mr. *Roupell*, for the plaintiff *G. H. W. Heneage*, in support of the re-hearing, contended, that the debts ought to be raised by a sale of the real estates, and not out of the annual rents and profits. *Trafford v. Ashton* (a), *Shrewsbury v. Shrewsbury* (b), *Bootle v. Blundell* (c), *Allan v. Backhouse* (d), *Ivy v. Gilbert* (e), *Evelyn v. Evelyn* (f), and *Green v. Belcher* (g), were cited.

Mr. *Skirrow*, for some of the defendants, and particularly

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| (a) 1 P. W. 415. | (d) 2 Ves. & B. 65. |
| (b) 1 Ves. jun. 234; 3 Bro. C. C. 120. | (e) Prec. in Ch. 583; 2 P. W. 13. |
| (c) 1 Meriv. 193; 19 Ves. 494. | (f) 2 P. W. 659. |
| | (g) 1 Atk. 505. |

for the first tenant in tail, insisted that it was a question of intention, to be collected from the whole will, whether the incumbrances were to be discharged out of the annual rents, or out of the estate itself, and that the former was evidently the intention of the testatrix. *Haycock v. Haycock* (a), *Talbot v. Shrewsbury* (b), *Okeden v. Okeden* (c), *Mills v. Banks* (d), *Water v. Hutchinson* (e).

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Mr. *Wray*, for some of the defendants.

Mr. *Tennant*, for the Earl of *Suffolk* and the other trustees.

LORD CHIEF BARON (*after stating the facts*).—In this case it has been argued, that, although the 8,000*l.* is directed to be paid out of the rents and profits, yet, that this direction does not mean out of the annual rents and profits only, but out of the *corpus* of the estate; and it has been said, that many cases have been decided, in which, under such a devise, it has been held, that the charge may be raised by sale or mortgage.

Upon looking into those cases, they do not appear to me to decide the question in the present case; the question now being, whether the testatrix did not intend this to be a charge upon the rents and profits given to the tenant for life or first tenant of the freehold. The cases are, however, material, as shewing that the words ‘rents and profits’ in devises of this description, do not necessarily mean annual rents and profits. In the earliest case which occurred on this point, the precise words were, in substance, immaterial, because, the remainder-men were either tenants in fee, or tenants in tail, with a power of converting the estate into a fee: they only affected the time at which those who were entitled to the charge should be paid; the remainder-man had to pay them sooner or later. But where the re-

(a) 1 Vern. 256.

(b) Prec. in C. 394.

(c) 1 Atk. 550.

(d) 3 P. W. 8.

(e) 1 Sim. & S. 276.

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mainder-man is tenant for life only, the application of this case is very important, for it comes to be a question, whether he shall pay the interest of the charge only, or whether he shall also pay the capital. This is strictly a question of intention, to be collected from the language of the will, with reference to the different provisions contained in it. There can be no doubt, generally speaking, that rents and profits mean annual rents and profits.

I think the cases shew, that where the remainder-man takes an estate of inheritance, unless there be something demonstrating a contrary intention in the deviser, the Court, in favour of the person entitled to the charge, if it be a gross sum, will raise it by sale or mortgage. The controversy becomes more important and critical where the remainder-man is tenant for life only. It is a question materially affecting the interest of the devisee, whether the *corpus* of the estate is to bear the charge, or the devisee is to lose all benefit of his estate, until the charge is satisfied.

I can treat this as a question of intention only. In the present case, it seems clear that the words 'rents and profits,' *primâ facie*, mean annual rents and profits. But if no inference arises from the dispositions in the will, to shew that the deviser so intended, there would be a very strong inclination on the part of the Court to construe these words in the manner they have often been construed, so as to prevent the tenant for life from entirely losing the benefit of the devise in his favour. However much I may regret it, I cannot help thinking, that, in the present devise, the intention is manifest to make the gross sums of 500*l.*, 700*l.*, and 8,000*l.*, charges upon the annual rents and profits; and the reasons upon which I come to that conclusion are, 1st, The testatrix uses the words rents and profits, which, *primâ facie*, mean annual rents and profits. 2nd, The gross sums are directed to be paid in the same terms as the annuities; and, therefore, if the argument on the

part of the plaintiff were correct, the testatrix must have used the same words to express different intentions—meaning annual rents, when she directs the annuities to be paid out of them; and a charge upon the *corpus* of the estate, when she directs the gross sums to be raised out of such rents and profits. And 3rdly, Some of the gross sums, *vis.* Mr. *Heneage's*, her husband's, debts, and her own mortgage, were already charges on the estate.

It is a strange provision to provide for Mr. *Heneage's* debts, by a charge upon the body of the estate, to the extent of a part of 8,000*l.*, when they were already, and independently of her intention, to the whole amount, a charge upon the *corpus* of the estate. If it be supposed that the testatrix meant to ease the inheritance at the expense of the first taker, then the whole is natural and consistent; and this supposition is the more probable, as all the devisees for life were at that time infants of tender age. The same observation applies to the mortgage. It is absurd, if it be considered, that the proportion of the 8,000*l.* to be applied in payment of the mortgage, is to be only a charge, of which the tenant for life was to keep down the interest only. It would, in effect, be doing nothing. But, it is a material and effective provision, if the testatrix intended, by a dedication of the rents for some time after her decease, to alleviate the burden which she had laid upon the inheritance.

The manner in which the testatrix disposes of the rents and profits after the trusts of the term shall have been satisfied, affords almost conclusive evidence, that she meant those trusts to be provided for by annual rents and profits. When her devise to the tenant for life is of the residue and overplus of the rents and profits, after the charges are satisfied, it is a manifest declaration, that the charges are to be satisfied out of the same rents and profits of which the residue is so given. The next provision, disposing of the surplus rents, in case of the remainder-

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man being an infant when the charges are satisfied, affords an argument of the same description, and equally conclusive. She directs the same trustees to take the rents, issues, and annual proceeds and profits: here she uses the words 'annual proceeds and profits' after the trusts respecting the payment of debts are satisfied, that is, after the 8,000*l.* is raised, she directs them, out of the surplus, to allow a maintenance to the infant remainder-man. Is it not obvious then, that, when she directs the maintenance to be raised out of the surplus annual rents, after the 8,000*l.* shall be levied and raised, that she understood the 8,000*l.* was to be raised out of the annual rents?

There arises, from the same provision, another argument, which is, if possible, more satisfactory, because it does not rest upon the use of two or three words, but upon the substance of the provision made. She directs the surplus of these rents, out of which the 8000*l.* is to be raised, after the maintenance is provided for, to be accumulated during the infancy of the first tenant of the freehold; and then, what does she direct to be done with it? She directs it to be laid out in land, and settled to the same uses. Can any thing be more inconsistent and absurd, than that she should direct a sum to be raised out of rents and profits, meaning by sale or mortgage, and then, when this shall be done, provide, that the surplus rents and profits shall be laid out in land and settled to the same uses.

Almost every paragraph convinces me that, when the testatrix directed the charges in gross to be levied and raised out of rents and profits, she meant annual rents and profits, and had an absolute intention, that no devisee of the freehold should receive any thing until those charges were satisfied. Other observations might be made to the same purpose, but I do not think it necessary to pursue the subject further.

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June 22nd.

JONES v. YATES.

DEMURRER on two grounds, but the argument was confined to one point only, the other being abandoned.

The ground of demurrer now argued was, that the bill, being filed by assignees, did not state that it was filed with such consent of the creditors as required by the statute (a).

Demurrer to bill by assignees of a bankrupt, on the ground that it did not state the suit to be instituted with such consent of the creditors or of the commissioners, as required by the statute 6 Geo. 4, c. 16, over-ruled.

Mr. *Knight*, in support of the demurrer, cited *Boxon v. Williams* (b).

Mr. *Jervis* and Mr. *Duckworth*, for the bill, relied on *Bevan v. Lewis* (c).

6 Geo. 4, c. 16
22 Geo. 4, c. 16

LORD CHIEF BARON.—My present inclination is, to over-rule this demurrer; but, before I do so, I will consult with the other equity Judges on the subject.

There is, certainly, great advantage in requiring a plaintiff to state his rights accurately on the record; but it seems to me very questionable, whether the act of Parliament intended that the assignees should be stopped from instituting a suit without the consent of the creditors, or only intended to provide, as between the assignees and the creditors, that the assignees should be responsible, if they instituted any suit without the consent directed by the act. In point of fact, the assignees, by the assignment to them, get that species of interest, which would enable them to institute any action or suit, but then comes the prohibition in the act. Now, whether that mere prohibition is to have the effect of depriving the assignees of the right, which their situation would otherwise give them, or has only the effect of rendering them liable to

(a) 6 Geo. 4, c. 16. (b) 2 Younge & J. 475. (c) 1 Glyn & J. 245.

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the creditors, for the consequences of any action or suit instituted without their consent, is very questionable.

I promised to speak to the other Judges about this demurrer. I have done so, and I am now disposed to over-rule the demurrer, but without costs.

I have spoken to both the Master of the Rolls and the Vice-Chancellor; and if those learned Judges continue of the opinion now entertained by them, a different rule will, for the future, prevail in the Court of *Chancery*.

Demurrer over-ruled, but without costs.

June 25th.

CUTTEN v. SANGER.

Where, on the hearing of the cause, the Court held, that there was not sufficient evidence of the insolvency of a person within the meaning of the Bankrupt act, 6 Geo. 4, c. 16, s. 75, so as to render void a settlement executed by him; and the plaintiff afterwards discovered further evidence of the insolvency, which, relying on the former evidence being sufficient, he did not obtain before the hearing, though he might have done so; the Court refused to grant a re-hearing, the petition not

being presented within six months from the date of the decree, according to the general order; the Court also considering, that the new evidence could not be received without allowing other evidence in explanation of, or contradiction to it.

IN this case, the plaintiff presented a petition for leave to present a petition for a rehearing (*a*), on the ground, that an inquiry ought to have been directed as to the insolvency of *Tucker*; but if not, yet, that the plaintiff had since discovered further evidence clearly establishing that fact, and which he would have been prepared with at the original hearing, if he had not considered that *Dandridge's* evidence was conclusive on the subject.

The evidence which the plaintiff was prepared to offer of *Tucker's* insolvency was, the production of the proceedings under an insolvent act, by which he was discharged out of prison; and an affidavit of the plaintiff's solicitor, that he had not before searched for that evidence, considering *Dandridge's* testimony sufficient evidence of the insolvency; and that, suspecting *Tucker* to have perjured himself, he had since searched in the proper offices, and had discovered the proceedings under the insolvent act.

(*a*) See the report of this cause on the hearing, 2 Younge & J. 459.

Mr. *Knight* and Mr. *O. Anderdon*, in support of the petition.—This petition involves two questions: *First*, whether a petition for rehearing can now be received, notwithstanding the general order of the Court (a), directing applications for a rehearing to be made within six months from the pronouncing of the decree; and *secondly*, whether it ought not to be received, on the ground of the discovery of the further evidence. Though the petition was not presented within the time prescribed by the general rule of the Court, yet special circumstances may induce the Court to dispense with the rule. *Milford v. Paternoster* (b), *Bowyer v. Bright* (c), *Wyld v. Ward* (d). The evidence respecting the renewal of the bills was presumed to raise a sufficient case for an inquiry as to *Tucker's* solvency. We have now clear evidence of his insolvency at the date of the deed, and evidence which could not at the hearing have been met or opposed, as we might have produced the discharge of *Tucker*, under the insolvent act, as an exhibit. In *Williamson v. Hutton* (e), the cause was reheard upon the discovery of additional evidence, and the decree varied. The judgment in *Milford v. Paternoster* is accompanied by an observation, that no other decree could have been made. In *Gratwicke v. Uttermare*, in the note to *Milford* and *Paternoster*, a rehearing was granted. *Needham v. Smith* (f) was also referred to on the part of the petitioner.

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1 G. & Loll Ex 271
2 — — — — 474
1 Youngs — 544

Mr. *Jervis*, for the defendants.—In *Williamson v. Hutton*, the only evidence admitted was some additional terriers. In *Gratwicke v. Uttermare*, the decree was not attempted to be altered. Though this cause was not heard until *June*, 1828, yet it was in the paper for hearing the

(a) 13 Nov. 1731; see 2 Fowl.
199.

(b) 1 M'Clel. & Y. 150.

(c) M'Clel. 479.

(d) 2 Younge & J. 381.

(e) 9 Price, 186, 194.

(f) 2 Vern. 463.

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preceding *January*, and, during all that time, the plaintiff must have known, from *Dandridge's* evidence, that *Tucker* had attempted to take the benefit of the insolvent act.

LORD CHIEF BARON.—There are a great many objections to this petition. In the first place, it is in opposition to the standing order of the Court, which had for its object, to put an end to litigation, and to compel persons in the first instance to bring forward their case as it ought ultimately to stand. It is of such importance to the administration of justice that these rules should be adhered to, and so beneficial to the public, that I think it is much better to run the risk of inflicting a slight individual injury, than that the public should be uncertain when the rules will, and when they will not, be enforced. It has been urged, that circumstances may occur which would justify a dispensation with the order. I will not now consider this, the whole Court having lately decided to the contrary. I will, however, go so far into the argument, as to consider, whether this case discloses any such special circumstances. As to the first point, the plaintiff's attorney must have known the facts to which *Tucker* was likely to be examined for the defendants, and that he would be called to prove his solvency, and he should have been on his guard, and have taken the necessary means for proving the insolvency. It is the very spirit and essence of cross-examination in equity, that parties, knowing who the witnesses are, but not what they are likely to prove, should produce evidence by a cross-examination of them or otherwise. He must have found in the depositions what *Tucker's* evidence was; but then, it is said, that he suspected *Tucker* had perjured himself. If this were true, the practice is very clear, he might have examined witnesses to impeach the credit of *Tucker*. I think the same difficulty will arise, even if a supplemental bill, in the nature of a bill of review, be filed. In such case, witnesses may

be examined to impeach the testimony of the other witnesses, and as to facts not material to the issue, but additional evidence cannot be entered into. The Courts have always been most anxious to prevent a fresh examination, with a view to avoid perjury. Whether the additional facts, now attempted to be introduced into this case, can be received, if a supplemental bill, in the nature of a bill of review, be filed; it will be for the Judge, who then sits here, to decide. I think it very doubtful whether they can be received. I cannot acquit the parties of negligence in not producing these documents at the original examination of the witnesses. In *Wyld v. Ward*, the documents could not in any manner be contradicted. In the present case, a mass of additional evidence is sought to be introduced. The fact of *Tucker's* being insolvent may admit of explanation. The defendants might, perhaps, be able to prove that he was solvent in 1821, notwithstanding his difficulties in 1815. If I were to admit this evidence, I must let in a general examination, and do that which a Court of equity has always struggled to avoid, in order to prevent perjury. I think I cannot let this petition be set down. I would, if necessary, give the plaintiff leave to file a supplemental bill, but no permission from me is necessary for that purpose.

I cannot help saying, that I now feel very great doubt, whether the infants have not gained an estate to which they are not entitled.

I must reject this petition, but without costs.

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BEFORE THE WHOLE COURT.

June 29th.

Lord KENSINGTON *v.* PUGH.

Permission given to exhibit an interrogatory after publication passed, to prove the antiquity of the hand-writing in a book preserved in the *British Museum*.

MR. BOTELER moved, after publication passed, for leave to exhibit an interrogatory, to prove the antiquity of the hand-writing in an antient book in the *British Museum*.

Mr. *Treslove* and Mr. *Haslewood*, for the plaintiff, opposed the motion, contending that the rule, with respect to proving the custody from which documents came, would be broken down, if the evidence were admitted, as a person might convey a spurious book or old document into the *Museum* for the purpose of manufacturing a title. They also contended, that the application ought to have been made before, and not after publication had passed.

The Court granted the application, on payment of costs.

BEFORE THE LORD CHIEF BARON.

July 2nd, 21st,
22nd.

BOZON *v.* WILLIAMS.

Motion for leave to except to the Master's certificate of the taxation of costs, refused. The

MR. BETHELL moved, that the plaintiff might be at liberty to except to the Master's certificate of the taxation of costs in this suit.

proper course is to petition, that the Master may review his taxation.

Where copies of deeds or other papers are furnished by either party to the Judge of the Court, the party is not entitled to the costs of such copies as against the other side, but they are merely personal costs, to be sustained by the party furnishing them, unless there be a fund in Court; this being in accordance with the practice in the Court of *Chancery*.

Where, on the hearing of the cause, the suit is decreed to be dismissed, it has been the practice in this Court for the decree containing the pleadings to be drawn at full length, whilst, in *Chancery*, a short order of dismissal is usually drawn up. *Memorandum*—The practice proposed to be altered for the future.

The LORD CHIEF BARON objected to hear the application on motion, and directed a petition to be presented.

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A petition was accordingly presented.

The petition complained of the allowance by the Master to the defendant's solicitor of various sums on the taxation of the costs. The items particularly objected to, and on which the discussion arose, were the sum of 40*l.*, charged for copies of deeds, &c., furnished by the defendant to the Lord Chief Baron, previously to his pronouncing judgment in the cause; and the sum of 30*l.*, charged for drawing up and entering the decree in the cause.

9 Linn. : 170.

Mr. *Bethell*, in support of the petition, contended, that the defendant was not entitled to the costs of any papers, furnished at the request of the Court; and, that the order being a decree of dismissal, it ought to have been only a short order, as was the case, as he stated, in the Court of *Chancery*.

Mr. *Walker*, for the defendants, in opposition to the petition, stated, that the Master had inquired into the practice in the Court of *Chancery*, and found, that it was there usual to allow the costs of copies of documents made for the Court. That many of the copies in this case were also necessarily made for the use of counsel. That, if the practice in the Court of *Chancery*, with respect to decrees of dismissal were as stated, still, it did not prevail in this Court; and, if the defendant objected to the length of the decree, he ought to have done so before it was drawn up.

LORD CHIEF BARON.—I have inquired into the practice in the Court of *Chancery*. I think there must be a review of the taxation in this case. I have ascertained that the taxation is not according to the practice in the Court of *Chancery*. I find, that, according

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to the practice in that Court, where papers are furnished by either party to the Judge, the amount is not allowed to the party, where they are personal costs, and do not come out of a fund; but there is no authority in the Court of *Chancery* for saying, that copies of any deeds or documents, not actually read at the hearing, but furnished by the parties to the Court, shall be costs as against the other party. I do not believe that any of these copies were made expressly for me, for I believe that they were made for the use of counsel.

It is quite established in that Court, which has far more extensive practice, that such costs cannot be allowed. And it is highly proper, that the practice of both Courts should be assimilated; and the certificate must, therefore, go back on this point. It certainly seems hard, that a party should not have the costs actually incurred by him, and should not be allowed copies made for the use of the Court, without counsel being put to read the original instruments.

With respect to the length of the decree, being merely a decree dismissing the bill, the decree seems, in this case, to be according to the established practice of this Court, though contrary to the practice of the Court of *Chancery*. Where a party has received the decree, and paid for it according to the practice of the Court, it would be most unjust to deprive him of those costs; and the defendant must, therefore, be allowed such costs in this case. But I will have this subject considered shortly. The petition must be dismissed as to this.

Minutes—Refer it back to the Master to review his taxation of the costs, so far as relates to the allowance of costs of copies of documents furnished to the Lord Chief Baron.

The remainder of the petition rejected.

BEFORE THE WHOLE COURT.

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Term.

WILLIS v. FARRER.

July 20th.

MR. JOHN WILLIAMS and Mr. *Boteler*, on the part of the plaintiff, moved to postpone the new trial of the issue directed in this case from the next assizes until the following Spring assizes.

Motion to postpone the new trial of an issue in a tithe suit from the Summer to the Spring assizes, on the ground, that the application for the new trial of the issue, and the decision of the Judge, granting the new trial, in which he stated the verdict on the first trial to be against the opinion of himself and the learned Judge who tried it, had been published in the newspapers, and was likely to influence the Jury, especially as it was to be tried by the same Judge, refused with costs.

The ground of the application was, that a report of the application to the Lord Chief Baron for a new trial (a), and of his Lordship's decision, granting the new trial, in which decision his Lordship observed, that the verdict was against the opinion of himself and of the learned Judge who tried it, had been recently published in the *Yorkshire Gazette*, and would greatly influence the minds of the Jury, especially as the issue would be tried before the same learned Judge. Whilst, if the trial were postponed to the Spring assizes, the public would forget the case, and possibly it might then be tried by another Judge.

Mr. *Brougham* and Mr. *Simpkinson*, *contra*.—It is most desirable that the issue should be tried by the same Judge; for, if his opinion be mis-represented in the report, he will have the opportunity of correcting it, and if not mis-represented, he will be able to tell the Jury that he continues of the same opinion. If this were a good objection, there never could be a new trial in *London* or *Middlesex*, the causes being always tried before the same Judge at *Nisi Prius*. No person can doubt that justice will be done by the learned Judge. The publication of the report is no ground for postponing the trial. Scarcely any application is now made for a new trial which is not published in the

(a) See this application, 3 Younge & J. 264.

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newspapers, and there is no pretence that this is inaccurate; on the contrary, it is admitted to be correct, having been taken by the short-hand writer of both parties. The rule, that the party intrusted to carry down the issue may make one default, does not apply to the case of a new trial; and, therefore, if the issue be not taken down at the next assizes, the defendant will be entitled to take the issue *pro confesso*.

LORD CHIEF BARON.—There seems to be no doubt that the report in this case is correct, and there is, therefore, no ground for delaying the trial. If it had been a misrepresentation, and there had not been sufficient time or opportunity to correct it, that might, perhaps, have afforded some ground. There does not appear to me to be any reason for not trying this the first opportunity, and before the same Judge. It cannot be better tried; and the argument on this point cannot be received. The plaintiff is entitled to the *postea*, and he can carry it down or not. I shall now abstain from expressing any opinion on the subject. If he neglects to take it down, that will be for future consideration. He will exercise his right under advice.

GARROW, B.—I have heard nothing which should induce the Court to stay the trial. The objection is, that the Jury, who may have to try the issue, may have read the report. How are they to be prevented from doing so? The Jury will, however, be told by the learned Judge who may try the issue, that they are not to found their judgment on any former trial, but on the evidence before them in the particular case. As to what the parties may do in the event of the issue not being tried at the next assizes, I abstain from giving any opinion.

HULLOCK, B.—I concur in abstaining from giving any

opinion on the circumstances of the case. I do not see any difficulty which did not exist before the first trial. If the plaintiff does not proceed, he will run the risk of a motion to take the issue *pro confesso* against him.

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VAUGHAN, B.—With respect to postponing the trial, I cannot listen to the grounds of the application. It has been said, that the publication may influence the minds of the Jury. But the accuracy of the report is not disputed. If the report had been accompanied by inflammatory remarks or observations, it might have been a ground for postponing the trial until the agitation occasioned by it had subsided. As to the objection of having the issue tried by the same Judge, it is the constant course in the administration of justice, and such an objection was never before suggested. No mis-direction is imputed to the learned Judge; and the mere circumstance of the verdict being against his opinion, cannot afford any ground for such a course. It has been said, that no inconvenience can arise by this delay. I am not sure of this; there may be many old witnesses, whose testimony may be lost by postponing the trial. I see no ground for the postponement. As to the effect of the order not being peremptory on the face of it, a question may arise, whether the party is, or is not, bound to try; this, will, however, properly be decided before the Lord Chief Baron in its proper place.

Motion refused, with costs.

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Where the residue of real and personal estates were devised by a testator to his two sons as joint tenants, and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the monies arising therefrom in one common stock, and with part of such monies purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other:—it was held, under the circumstances, that they continued, at the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates.

MORRIS v. BARRETT.

WILLIAM BARRETT, by his will, dated 1st November, 1803, executed and attested so as to pass real estate, after certain specific devises and bequests, devised and bequeathed all the rest and residue of his real and personal estate, of what nature or kind soever, and wheresoever, to his two sons *Joseph Barrett* and *James Barrett*, to hold to them, their heirs, executors, administrators, and assigns, for ever, and appointed them joint executors of his will.

Joseph Barrett and *James Barrett* duly proved the will, and entered upon and possessed themselves of such residue, which consisted, among other things, of several estates, whereon their father had carried on the business of a farmer, and of stock, goods, monies, and securities for monies. And they cultivated and managed, in the usual manner of farmers, in common, the estates of their father included in the said residue, and kept their monies arising therefrom in one common stock, to which each had access; but they never entered into any agreement or understanding as to such farming, nor ever accounted the one to the other of them in respect thereof, or of the monies which from time to time formed such common stock; and certain monies, arising as well from the sale of the said stock and the calling in of the securities of their father, as from the profits of their business, were from time to time laid out in the purchase of certain estates in the name of the said *James Barrett*, which, when so purchased, they let, and added the rents thereof, as they were from time to time received, to the common stock.

James Barrett, by his will, dated 15th January, 1824, duly executed and attested to pass real estate, gave and devised as follows:—"I give and devise unto my brother *Joseph* as well all the freehold as also all the leasehold

estates to which we are entitled under the will of our late father, that is to say, as to the freehold to him and his assigns for and during the term of his natural life, and as to the leasehold, to him for and during so many years of my term and estate therein as shall run out and expire in his lifetime; and from and after the decease of my said brother *Joseph*, I give and devise all the said freehold and leasehold estates unto my friends, *Thomas Fooks*, of *Sherborne*, in the county of *Dorset*, gentleman, and *John Stone*, of *Hilfield*, in the same county, gentleman, and to their heirs, executors, administrators, and assigns, according to the nature of the estates respectively: but, nevertheless, upon, and subject to the trusts, and for the purpose of making sale thereof as hereinafter mentioned. And I give and devise unto my friends the said *Thomas Fooks* and *John Stone* my close of freehold land, late *Belamy's*, at *Sherborne* aforesaid, and my copyhold estate at *Stake-under-Hamdon*, in the county of *Somerset*, as well as all my other freehold and leasehold estate whatsoever or wheresoever; but, nevertheless, upon the trusts and for the purposes hereinafter mentioned, that is to say, in trust to let the same for the best rent that can be reasonably obtained, until the residue of my personal estate hereinafter bequeathed shall come to be divided, when it is my will, that the said freehold and leasehold estate shall be sold by public auction for the best price that can be obtained, the rents and profits thereof in the meantime to be received, being from time to time to be united with the residue of my personal estate; and my will is, and I do direct, that the freehold and leasehold estate above given and devised to my said brother *Joseph* for his life, shall either be sold in like manner at the time of his death, or otherwise let in like manner as I have directed with regard to the other estates, and then sold at the same period of time as those estates are: and as to all the money arising from the sale of all my freehold and leasehold estates so

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directed to be sold, my will is, that the same, when received, shall be united with the residue of my personal estate, unless circumstances shall require any part to be taken for the purpose of paying any legacy given by this my will, from any unforeseen loss or deficiency in my personal estate. I give and bequeath to my said brother *Joseph* all my live and dead stock and household goods and furniture that may be in and about the house and farm at *Baileyridge* and *Leigh* aforesaid; and, unless he thinks proper to institute any examination into my accounts respecting our joint concerns as farmers, I direct that no account shall be made out or claimed against him, my will and desire being, that every thing shall be considered as finally settled between us." The testator, after giving all his money, and securities for money, and the residue of his personal estate unto his said brother *Joseph*, and the said *Thomas Fooks* and *John Stone*, their executors and administrators, upon the several trusts therein mentioned, and under which the several plaintiffs in this case took beneficial interests, some for life, and others absolutely, he appointed the said *Thomas Fooks*, *John Stone*, and *Joseph Barrett*, executors of his said will. *James Barrett* died soon after making his will, leaving *Joseph Barrett*, his brother and heir-at-law, also his customary heir; and, after his death, *Thomas Fooks* alone proved his will.

The bill was filed by the plaintiffs, as legatees and persons beneficially entitled under the will of *James Barrett*, against *Joseph Barrett*, and *Fooks* and *Stone*, the trustees and executors, for the several accounts of the real and personal estates of the said *James Barrett*, and of his debts, funeral, and testamentary expenses and legacies, and to have the claims of the plaintiffs secured and paid to them.

The defendant, *Joseph Barrett*, by his answer, set up a claim by survivorship to all such parts of the real and

personal property as were devised to him and his brother by the will of their father, *William Barrett*.

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Mr. *Wyatt*, and Mr. *Warry*, for the plaintiffs.—There can be no doubt that, as to the profits derived from the carrying on of the partnership business, there was a severance, and that the parties were tenants in common. *Jackson v. Jackson* (a). If there be a severance as to the profits, there can be no reason why the capital should not also be severed. A covenant to sell has been held to be a severance; so, an agreement or a mortgage. In *Jackson v. Jackson*, Lord *Eldon* lays down the rule as being in favour of merchants. And if personal property used for the purposes of trade be not subject to the *jus accrescendi*, neither is real estate so used, both being merely treated as stock for the purposes of trade. *Selkrig v. Davis* (b), *Crawshay v. Maule* (c). The mode in which the property is treated gives a character to it. *Morley v. Bird* (d). In this case, the two brothers treated the property, for upwards of twenty years, as partnership property.

Mr. *Pasmore*, for the defendants in the same interest as the plaintiffs.

Mr. *Jervis*, and Mr. *Spurrier*, for the defendant *Barrett*.—*Jackson v. Jackson* was decided upon the peculiar language of the will in that case. A residue bequeathed to two, without words of severance, is clearly a joint interest. *Crooke v. De Vandes* (e). Admitting, that an agreement for a severance may be inferred from the conduct of the parties, with regard to the property, still, there is nothing in this case to warrant such an inference. The defendant does not dispute that the estates purchased with the profits of the business, and the partnership stock, were pro-

(a) 7 Ves. 535; 9 Ves. 591.

(d) 3 Ves. jun. 629.

(b) 2 Dow, 230.

(e) 9 Ves. 197.

(c) 1 Swanst. 495, 521.

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perty held by the brothers as tenants in common, but contends, that the leasehold estates, and the personal estate, of which the father died possessed, were held by them as joint tenants. With regard to the real estate, no doubt can be entertained. Where real estates, conveyed to persons in form as joint tenants, have been adjudged to have been held by them as tenants in common, the estates have been purchased expressly for the purposes of a partnership, or for a joint speculation, as in *Lake v. Craddock* (a). No case can be cited, in which real estate devised has been converted from an estate in joint tenancy to a tenancy in common. In *Jackson v. Jackson*, the real estate was directed to be treated as personalty, and the object of the testator was to form a partnership. In *Jeffereys v. Small* (b), it was held, that if two take a lease of a farm jointly, it shall survive; but the stock, though used jointly, shall not survive; and though the Lord Chancellor, in commenting on this case, in *Jackson v. Jackson*, treats it as not being now law, in some respects, still, it is good, so far as regards the lease. In the present case, there were no accounts stated between the parties, no division, nor any acts tending to shew an intention to create a severance.

Mr. *Wyatt*, in reply.—In *Jackson v. Jackson*, Lord *Eldon* held, under the circumstances of that case, that, though a joint tenancy was created by the will, yet the course of dealing between the parties had rendered it a tenancy in common. There are equally special circumstances in this case to induce the Court to come to the like conclusion.

July 24th.

On this day, the LORD CHIEF BARON expressed his opinion, that, as to the leasehold and personal estate which passed by the will of the father, *William Barrett*, the two sons remained joint tenants; but, that, as to all the after-purchased estates, they were tenants in common.

(a) 3 P. Wms. 158.

(b) 1 Vern. 217.

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BROWN v. REINA.

March 2nd.

BILL for a discovery, and injunction to stay proceedings at law. The answer being filed, the bill was amended, to which an answer was also put in: four exceptions were taken to the answer to the amended bill. On the 26th *February*, an injunction was granted on the opening of a material exception, the other three exceptions being submitted to. On the same day, an order was obtained for leave to amend, and that the defendant might answer the amendment and the exceptions at the same time.

The common injunction to stay proceedings at law cannot be extended to stay trial after an order to amend.

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Mr. Pasmore now moved, on the part of the plaintiff, that the injunction might be extended to stay trial.

Mr. Wakefield, for the defendant, contended, that the plaintiff could not obtain an order to extend the injunction to stay trial after the order to amend.

And the LORD CHIEF BARON being of this opinion,

Refused the motion.

ROBERT GARDNER v. MARY LYDDON, and Others.

CHARLES WINTER, by his will, duly executed and attested to pass freehold estates, dated 23rd *December*,

Devise to *A.* and *B.* and their heirs, to sell and dispose, at their discretion, of all

the testator's right in *King's Sedgmoor*, belonging to the manor of *Moorlinch*, and all his right in *Moorlinch*, if an act should pass for inclosing the said moor within twenty years, and to pay the proceeds to the several persons therein mentioned. An inclosure act passed within the twenty years, and various allotments were made in respect of the testator's estates:—*Held*, that the devise was in the nature of an executory devise, to take effect on the passing of the act; and, that, under the devise, the devisees took a quarter part of the money produced by the sale of the allotments in *King's Sedgmoor*, in respect of the manor of *Moorlinch*, and the whole of the proceeds of the sale of allotments in respect of lands in *Moorlinch*.

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1785, (among other things), devised to his niece *Mary Winter* all that meadow, by *Parker's* house, in *Moorlinch*, during his right therein, if she married a man worth 300*l.*, but, if she married a man worth less than 300*l.*, he gave and bequeathed the same to his nephew *Charles Winter*. And the testator gave and bequeathed unto his brother-in-law *John Lyddon*, and his kinsman *George Beckham*, and their heirs, to sell and dispose, at their discretion, one quarter part of all his right in *King's Sedgmoor*, belonging to the manor of *Moorlinch*, and all his right in *Moorlinch*, if an act should pass for inclosing the said moor within twenty years. And he directed the monies, to arise by such sale, to be equally divided between his sister, the defendant *Mary Lyddon*, and all her children; and the defendant *Richard Williams*, son of their daughter, the defendant *Mary Williams*, and their heirs; also all the children of the said testator's sister, *Betty*, the late deceased wife of the plaintiff *Robert Gardner*, and their heirs; and the children of his niece, the defendant *Joan Blake*; and also all the children of his nephew, the defendant *Richard Gardner*; and all the children of his niece, the defendant *Eleanor Bickham*; and also his said nephews and niece, the defendants *John Winter*, *Charles Winter*, and *Mary Winter*; to be equally divided between them, the amount of what it should be sold for by his trustees before mentioned. And all the rest, residue, and remainder, of his estate, lands, goods, and chattels, the said testator thereby gave and bequeathed unto his said sister, the defendant *Mary Lyddon*, and her husband, *John Lyddon*, and their heirs for ever, subject to the payment of his just debts and legacies thereinbefore given. And the testator appointed them joint executrix and executor of his said will.

The testator died on the 15th *March*, 1791.

In the 31st *Geo. 3*, (1791), an act was passed for draining and dividing *King's Sedgmoor*.

The bill was filed by the plaintiff on behalf of himself and the other creditors of the testator, seeking the usual accounts and the marshalling of assets; and it raised the question, what rights and interests in *King's Sedgmoor* and *Moorlinch* were intended to be passed by the devises before alluded to.

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Upon the hearing of the cause, it was referred to the Deputy Remembrancer to take the usual accounts, and to sell such parts of the said testator's estates as remained unsold.

Various proceedings were had before the Deputy Remembrancer, and, afterwards, before the Master; and all the testator's estates were sold.

By a decree, made on the 24th *December*, 1814, it was, among other things, ordered, that the Deputy Remembrancer should report what was the amount of the clear surplus after the payments therein directed; and that he should distinguish how much thereof arose from the sale of the fee-simple estates, how much from the estates held upon leases for lives, how much from the copyhold estates, and how much from the personal estates.

Master *Spranger*, by his report, dated 16th *June*, 1829, stated the result of the inquiries directed by the last-mentioned order. And, by his report, and the schedules thereto, it appeared, that very considerable sums had been produced by the sale of allotments of land in *King's Sedgmoor*, allotted under the act before alluded to, in respect of divers fee-simple estates of the testator.

The cause now came on for further directions, the points for discussion being, what interests in *King's Sedgmoor* and *Moorlinch* passed by the will.

Mr. *Roupell*, and Mr. *Sharpe*, for all the defendants, except *Mary Lyddon*, and *Govett* and wife.—The defendants are entitled to one quarter of the monies produced by the sale of all the lands allotted in *Sedgmoor*, and to all the monies produced by the sale of all the es-

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tates in *Moorlinch*. The words of the will are large enough to convey every interest which the testator had in *Moorlinch*.

Mr. *Simpkinson*, and Mr. *Spence*, for the defendant, *Mary Lyddon*.—The words of the will are inconsistent; the testator only intended to give one quarter of the whole. And he only meant to give commonable rights, in case *Sedgmoor* should be inclosed. The testator was lord of the manor of *Moorlinch*, and, in such character, was entitled to certain commonable rights in *Sedgmoor*. He was entitled, in respect of his manorial rights, to common of pasture for all commonable cattle; and this being a common appurtenant to his estate, he was not able to sever those rights from his estate. Common appurtenant cannot be granted to another (*a*). Nor can common appurtenant, or appendant, be turned into common in gross (*b*). Supposing, however, that it was competent to him to sell his commonable rights, and that, by law, he could devise them, the question will then be, what share or proportion has he devised. We contend, only one quarter of those commonable rights. It would be an extraordinary construction, to hold, that he gives one quarter in one place, and the entirety in another, in the very same sentence: according to the plain grammatical construction of the sentence, he gives one quarter of his rights in *Sedgmoor* and *Moorlinch*, and the whole intention would be answered, by carrying the preposition *of* forward, and making it govern the whole sentence. And, that the Court might so construe the sentence, *Jones v. Smart* (*c*) was cited.

LORD CHIEF BARON.—It is impossible to be certain what the testator meant by this devise. I can only venture to make a reasonable guess. The construction, I

(*a*) Cro Jac. 14.

(*b*) 1 Rol. Ab. 401.

(*c*) 1 T. R. 44.

think, I ought to give it, is, that it is an executory devise, to take effect after an inclosure act. I think it is a condition precedent, and that no interest passed to the devisee until the act passed. The question is, what the testator meant by his right in *King's Sedgmoor*. It is clear, that he must have meant his right of common, which, in his view, was to be his common interest in the lands allotted in lieu of the right of common in *Sedgmoor*.

The next point is, what passes by all his right in *Moorlinch*; on which two questions arise: *First*, whether the preceding words, 'one quarter part,' over-ride the whole sentence, so as to include this; or, *secondly*, which is favourable to the residuary legatee, whether all his right in *Moorlinch* may not mean, all his estate in *Moorlinch*, with the appurtenances; or, whether it means only his commonable right. It may mean either the one or the other.

If he had said in a separate clause, "I give all my right in a house, &c. at *Moorlinch*," it would have passed the fee. I have no right to limit the bequest of all his right in *Moorlinch* to the one-fourth part of his right, which he gives with respect to *Sedgmoor*. What right have I to say, that he did not mean to give all his right in *Moorlinch*. I think, therefore, that the whole of *Moorlinch* must be considered to pass under these words, and not a quarter part; but I think he meant to give only such common rights as followed his lands in *Moorlinch*; that is, all such allotments as should be made in respect of his commonable rights in *Moorlinch*.

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The decree declared the parties claiming under the devise to be entitled to one-fourth part of the monies produced from the sale of the allotments in *Sedgmoor*, in respect of the testator's messuage and lands in *Sedgmoor*, and to the whole of the monies produced by the sale of the allotments, in respect of lands in *Moorlinch*.

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May 24th,
June 6th,
July 2nd, 6th.

Interest is not allowed on a judgment, except under special circumstances, and where there is no imputation on the creditor; and, therefore, interest was refused on a judgment, where the creditor, being also mortgagee, had been in the receipt of the rents and profits of the mortgaged estates; and the propriety of his conduct was questioned with respect to the manner in which he had become such mortgagee, and with respect to his accounts, both as such mortgagee, and also as solicitor, agent, and steward, to the mortgagor.

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LEWES v. MORGAN.

THE exceptions to the Master's report having been disposed of (a), the cause now came on for further directions.

Mr. *Jervis*, Mr. *Wigram*, and Mr. *West*, for the representatives of Sir *W. Lewes*.

Mr. *W. Loftus Lowndes*, and Mr. *Morgan*, for the representatives of Mr. *Morgan*.

One of the points discussed on the hearing for further directions was, whether Mr. *Morgan's* representatives were entitled to interest on the judgment obtained by him against Sir *W. Lewes*.

In support of the claim to interest, it was argued, that though, according to the ordinary practice in the Master's office, interest was not computed on a judgment, yet that, under the special circumstances of this case, interest ought to be computed. That, although the same state of circumstances had existed, yet the point had never been brought to the attention of the Court. That *Morgan* was considerably in advance to Sir *Watkin Lewes* before the surplus rents came into his hands, and he had, by virtue of his judgment, a lien on the rents. That the Master, in taking the accounts, had applied the surplus rents in keeping down the debt due, and the costs, but had not allowed any interest on the debt. And *Loftus v. Swift* (b), *Bellew v. Russell* (c), *Godfrey v. Watson* (d), and *Clarke v. Seton* (e), were referred to.

In opposition to the claim for interest, *Clarke v. Seton*

(a) See *ante*, p. 230.

(b) 2 Sch. & Lefr. 642.

(c) 1 Ball & B. 96.

(d) 3 Atk. 517.

(e) 6 Ves. 411.

was cited; and the general conduct of *Morgan* throughout the transactions was relied on as depriving him of the right to interest on the judgment. Mr. Baron *Graham's* observations, as reported in 5 *Price*, 151, were also referred to.

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LORD CHIEF BARON.—I apprehend, that it is quite contrary to the ordinary course of the Court to give interest on a judgment, unless under very special circumstances. The cases which have been cited are, unquestionably, according to the rules of this Court; but the question is, whether they have any application to the present case. One of the earliest cases was a case before Lord *Hardwicke*, in which it is stated by that learned Judge, that, where a judgment creditor extends the land by *elegit*, which the Sheriff does only at the annual value, and much below the real value, the creditor holds *quousque debitum satisfactum fuerit*; and, at law, the debtor cannot, upon a writ *ad computandum*, insist upon the creditor's doing more than account for the extended value; but, if the debtor comes into a Court of equity for relief, the Court will give it him, by obliging the creditor to account for the whole that he has received; and, as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal. The principle of this case is plain; the debtor seeking the assistance of a Court of equity, the Court will not give him that assistance without his doing equity to the creditor, by allowing him interest on his debt. It is a mere equitable right, without any imputation on either of the parties. The same principle pervades all the cases; the strongest being that in which it is said, that a mortgagee having tacked a judgment to his mortgage, shall not be confined to the penalty of the judgment, but shall be entitled to interest on the debt secured by the judgment, though it exceed the penalty, down to the time the

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principal is paid off; but, in that case, there could be no imputation on the conduct of the mortgagee. All the decisions have been in cases where mutual justice could not be done without interest being given, and where there was no imputation on the party prevented from following up his legal right. Those cases have, however, no application to the present. In deciding this question, I must advert to Mr. *Morgan*, premising, that whatever may be said as to him, casts no imputation whatsoever on his representatives.

The original conduct of Mr. *Morgan* led to all the discussions on the subject of the mortgage. I can perceive no distinction between that subject and the rest of the case. I am bound, by what has been done in the cause, to consider Mr. *Morgan* as having been the guilty party, and Sir *Watkin Lewes* as innocent.

Mr. *Morgan* having got into possession of the estates, receives the rents, and having them in his own pocket, desires to keep them there, and to have interest on the one side of the account, without allowing it on the other.

Mr. *Morgan* was not in the situation of any of the parties in the other cases. He had no merits, nor any equity in his favour.

I must decline to allow interest on the judgment.

Another point was, the question of costs.

For the personal representatives of Sir *W. Lewes*, it was contended, that, in equity, as at law, costs generally followed the result of the case; that this was a suit to impeach an account, which had been successful to the extent of striking out at least one-third of the demand. The following cases were cited on the part of the personal re-

presentatives. *Coles v. Trecothick* (a), *Huguenin v. Basely* (b), *Gibson v. Jeyes* (c), *Baker v. Wind* (d). Exch. Ch. in Eq.
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For the representatives of Mr. *Morgan*, *Gilbert v. Golding* (e) was cited.

July 6th.

LORD CHIEF BARON.—I have over-ruled the first exception, which objected to the Master's report of the 10th *December*, 1828, because it found, in pursuance of the former order, that the mortgage-money was paid off on the 3rd of *September*, 1824.

I also over-ruled the second exception, which objected to the Master's report, because he had not allowed the 2400*l.* which had been secured by bond, but had called for evidence of the actual advances.

I likewise over-ruled the third exception, which was in substance the same as the second.

The fourth and fifth exceptions are also overruled. They depend upon the first and second. They object to a statement of the account, and of the balance, which is the necessary and arithmetical result of what is done by the Court on the first and second exceptions.

Upon further directions there are four points—

First, Whether *Morgan* shall have any interest on the sum allowed in the general account, and which had been rejected from the mortgage account in the course of the previous proceedings. *Secondly*, Whether he shall have any interest upon the judgment. *Thirdly*, Whether the representatives of Sir *W. Lewes* shall have any, and what, interest on the balance of rents and profits remaining in his hands after the whole debt is satisfied. And *fourthly*, the costs.

I think *Morgan's* estate must have interest to a certain amount. The sums to which I shall first direct my attention are such as were covered by the bond of 2400*l.*, being

(a) 9 Ves. 234, 246.

(d) 1 Ves. 160.

(b) 13 Ves. 105; 15 Ves. 180.

(e) 2 Anstr. 442.

(c) 6 Ves. 266, 278.

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to the amount of 1315*l.* 10*s.* This sum is allowed to Mr. *Morgan* as advanced by him to the use of Sir *Watkin Lewes*. It was contended by *Morgan*, to be the consideration of the 2400*l.* bond, dated the 28th *February*, 1775. This bond formed part of the mortgage. It was entirely rejected from the mortgage, in consequence of the Deputy Remembrancer's report, made under the directions, and according to the principles laid down in the House of Lords. The same principles have compelled me to hold, that the bond could not be received, in taking the general account, as satisfactory evidence of a debt due from Sir *W. Lewes* to *Morgan*; but that *Morgan* was called upon, under the peculiar circumstances of this case, to prove, *aliunde*, that the sums were actually advanced. He has been required to do so, and he has been allowed, upon that footing, the sum of 1315*l.* 10*s.*, now under discussion. Requiring evidence, *aliunde* than the bond itself, to establish its consideration, does not prove that *Morgan* the obligee shall not have the benefit of it as a bond, so far as he does establish the consideration by extrinsic evidence.

The doubt I have entertained upon the subject arose from this, that the reports of the Deputy Remembrancer do not immediately connect these sums with the bond at the time it was given. The consideration of it was anterior bonds, and the Deputy Remembrancer has, in effect, reported, that no money, except 25*l.*, was specifically advanced at the date of the bonds, and in respect of them. I think, however, that although it must be taken, that hardly any thing was specifically advanced in respect of any bond at the time it was given, yet, that it is a just deduction from all those proceedings, that the bond for 2400*l.* was given by Sir *W. Lewes*, and received by *Morgan*, as a security for money advanced.

This being established, it is, I think, according to the course of the Court, that *Morgan's* representatives should have the benefit of it, *qua* bond, so far as money had been advanced, that is, to the amount of 1315*l.* 10*s.*

It follows from this view, that *Morgan* should have interest upon the money covered by this bond up to the amount of the penalty, which I presume is 4800*l*.

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The next question relates to interest on the judgments.

There are two judgments on warrants of attorney, dated in *July*, 1778, one for 1142*l*. to *John Morgan*, the other to *James Morgan*, as the executor to *Chardin Morgan*. In *April*, 1779, *John Morgan* also obtained another judgment for 569*l*. *Morgan's* estate is allowed the amount of all these judgments in the general account, but no interest is calculated upon them. It is contended, that interest should be allowed; I can find no principle to warrant such an allowance. Judgments do not carry interest in accounts in equity: though, under particular circumstances, interest has been allowed; as, where the judgment creditor has, upon false pretences suggested by the debtor, been restrained by injunction from taking execution upon his judgment. Nothing of that sort happened here. On the contrary, *Morgan*, on other pretences, got into possession of the bulk of *Lewes's* property, and actually, long ago, paid himself this and all other debts. It has been said, that, where a judgment may be tacked to a mortgage, there should be no redemption, without paying interest on the judgment. I will not say how far this is accurately stated. The answer upon this occasion is, that these judgments cannot be tacked to the mortgage. The parties are different, and all the principles of equity on which the doctrines of tacking are founded, are, in this case, adverse to it. I can give no interest on these judgments.

The *third* question is, whether *Lewes* shall have interest on the balance of *Morgan's* receipts, after he was fully paid. I shall say, upon this subject only, that I concur in the opinion of the Master of the Rolls in *Quarrell v. Beckford* (a). I think *Morgan's* representatives must pay simple interest at 4*l*. per cent.

(a) 1 Madd. 269.

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The question of costs is not decided by any thing which I have found in the cause. The original decree reserves the consideration of costs. If it had been a decree for redemption, it would have directed costs to be added to the debt, and decreed the reconveyance upon payment of the whole. It reserves the consideration, as I have stated. The order for the separate report in 1801 does not mention costs. The order, by consent, in 1810, was conditional only, and in express terms reserved every question in the cause. I have always thought so, and think so now. Therefore, the question is still open.

I think Sir *W. Lewes's* estate ought to pay the necessary costs of redemption; but, that *Morgan* ought to pay all the costs of the questions respecting the amount of the mortgage, or the balance of the general account. That, in every proceeding, the costs of which are not, by the course of the Court, costs in the cause, there should be no other costs than have been given by the order made on such proceeding, or are due on such proceeding by the general rules of the Court. Where no costs are given, either by special order upon the occasion, or by the general rules or orders, then no costs on either side.

Minutes of Order on Further Directions.

Over-rule all the exceptions with costs, to be taxed. Confirm the Master's report of the 10th *December*, 1828, except so far as is hereinafter mentioned. Declare that *Francis Morgan*, as the personal representative of *John Morgan*, is entitled, as against Sir *W. Lewes*, or *John Jenkins* and *Philip Hurd*, as his personal representatives, to be allowed in account, interest, at the rate of 5*l. per cent. per annum*, from the 28th of *February*, 1775, being the day of the date of the bond for 2400*l.*, in the pleadings mentioned, upon the

principal sum of 1315*l.* 10*s.*, mentioned in the first schedule to the said Master's report, to any amount, not exceeding in the whole, 4800*l.*, the penalty of the said bond.

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Let the Master review his said report of the 10th *December*, 1828, so far as he has thereby found, that, on the 11th *August*, 1814, a balance or sum of 1065*l.* 9*s.* 9*d.* was due to the estate of the said Sir *W. Lewes* from the said *John Morgan* or his estate, to the extent required by the above declaration.

Declare, that *John Morgan's* representatives are entitled, after satisfaction of the mortgage debt, to apply the rents of the mortgaged estate to the satisfaction of the judgments, before applying them in satisfaction of the bond for 2400*l.* and interest, without disturbing the application in respect of his bills of costs, mentioned in the proceedings, and the interest thereon.

Let the Master, on that footing, ascertain and state to the Court, when the debt due from the said Sir *W. Lewes*, or his estate, to the said *John Morgan*, or his estate, was paid and satisfied, and what (if any) balance was due to the estate of the said Sir *W. Lewes* from the said *John Morgan*, or his estate, on the day on which that debt was paid and satisfied.

Declare, that the said Sir *W. Lewes* or his estate is entitled, against the said *John Morgan* or his estate, to be paid, or to have credit, in account for interest, at the rate of 4*l.* *per cent. per annum*, upon the balances (if any) which are due to the said Sir *W. Lewes* or his estate from the said *John Morgan* or his estate, on

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the day upon which the Master shall find that the debt due from the said *John Morgan* or his estate, to the said Sir *W. Lewes* or his estate, was paid and satisfied; and also upon the balances which, from time to time, since that day, have become due and owing from the said *John Morgan* or his estate, to the said Sir *W. Lewes* or his estate; and refer it to the Master, to compute interest upon such balances as aforesaid.

Let the Master ascertain, and state to the Court, what balance now remains due from the said *John Morgan* or his estate, to the estate of the said Sir *W. Lewes*, upon the footing of the aforesaid declaration and direction. In every proceeding, which, by the course of the Court, the costs are not costs in the cause, there shall be no other costs than have been given by the order made on such proceedings, or as are due on such proceedings by the general rules of the Court. Where no costs are given, either by special order upon the occasion, or by the general rules or orders, there no costs on either side.

Let the Master tax all parties, (except the defendants, *Hubert Evans*, *John Jenkins*, and *Philip Hurd*), their respective costs of their suit, so far as the same is a suit to redeem the mortgaged premises, in the pleadings of this cause mentioned; and let the Master tax the costs of all the parties in this suit respectively, except the said *John Morgan* and *James Morgan*, and their respective representatives, so far as the same costs have been occasioned by the controversy respecting the amount of the

several mortgages, and the amount of the general balance due to him from the said Sir *W. Lewes* or his estate.

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Let the costs of the said *John Morgan*, and of the said *Francis Morgan* as his representative, so far as this suit is a suit to redeem the mortgaged premises, be deducted from the balance which the said Master shall find to be due from the estate of the said *John Morgan* to the estate of the said Sir *W. Lewes*.

Let the costs of the other parties, except the defendants, *F. Morgan*, *H. Evans*, *J. Jenkins*, and *P. Hurd*, so far as this suit is a suit to redeem the said mortgaged premises, be paid to them respectively out of the sum of £——, now standing in the name of the Accountant-General, in trust in this cause.

Let the costs of the defendant *J. Wilder*, so far as such costs have been occasioned by the controversy respecting the amount of the several mortgages, and the amount of the general balance due to or from the said Sir *W. Lewes*, or his estate, be paid out of the residue of the £——; and let the amount of such costs, as last mentioned be added to the balance, which the said Master shall find to be due from *J. Morgan* or his estate, to the estate of the said Sir *W. Lewes*. And let the amount of the costs of the said Sir *W. Lewes*, and of the said *J. Jenkins*, *P. Hurd*, and *H. Evans*, as his representatives, so far as such last mentioned costs have been occasioned by the controversy aforesaid, be paid by the said *F. Morgan* as such personal representative, out of the assets of the said *John Morgan*, he admitting assets sufficient to cover the balance that

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the Master shall find to be due from the estate of the said *J. Morgan*, to the estate of the said Sir *W. Lewes*; together with the amount of such last-mentioned costs, and the costs of the said *J. Wilder* to be added as aforesaid. Let him pay the balance and costs into the Bank in trust in this cause. Let all proper parties convey, surrender, or assign, the mortgaged premises, and let the Master settle and approve of such surrender or other conveyance, in case the parties differ.

Let the parties deliver into the Master's office, on oath, all deeds that are, or ever were, in their custody, possession, or power, relating to the said mortgaged premises.

Let the receiver pass his accounts, and be discharged. Declare, *J. Morgan's* representatives are entitled, after satisfaction of the mortgage debt, to apply the rents of the mortgaged estate in satisfaction of the judgments, before applying them in satisfaction of the bond for 2400*l.* and interest, without disturbing the application in respect of his bills of costs mentioned in the proceedings, and the interest thereon. Conveyances to be executed to *H. Evans*, the heir-at-law of the testator. Liberty to make separate reports, and to apply.

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*Sittings after
Easter Term,
June 12, 15.*

BILL by the rector of *Elmley-Lovett*, in the county of *Worcester*, claiming to be entitled to all tithes, great and small, against an occupier, for tithes of colts, calves, pears, and milk, and for the tithes of lambs of ewes, called by the defendant wintered ewes.

The defendant, by his answer, admitted the plaintiff to be rector, but denied his right to all tithes, both great and small, arising, renewing, or increasing, within the rectory, in kind; for, on the contrary, the defendant had been informed and believed, that the plaintiff, as such rector, was entitled to receive, and that all former rectors, the predecessors of the said plaintiff, had, from time whereof &c., been entitled to receive, and had received, certain customary payments in lieu and in satisfaction and full discharge of the tithes of colts, and calves, and pears, and milk, and of the tithes of lambs of ewes, called wintered ewes, thereafter more particularly mentioned; besides other pecuniary payments in lieu of other tithes.

The defendant admitted his occupation, and alleged, that he had, during such occupation, duly set out or accounted to the plaintiff for all tithes, great and small, yearly growing, arising, renewing, and increasing in and upon his lands, except the tithes of colts, calves, pears, and milk, and the tithes of lambs of ewes, commonly called wintered ewes, (that is to say), such ewes as were taken upon a farm "*to tack*," an expression well understood in the neighbourhood of the said parish, for the winter season; and the defendant said, he had not taken, or kept, or had, since the period in the answer mentioned, any wintered ewes. The defendant then admitted his having had colts, calves, and milk, and in each year as many pears as were sufficient to make four hogsheads of perry, at the value of *2l. 10s. per* hogshead.

He admitted, that he had not set out, or rendered to the

A single terrier, unsupported by usage, is wholly insufficient to establish a modus, though there be not only no proof of payment of tithes in kind, but uniform evidence of the non-payment of tithes in kind, within living memory.

To support a parochial modus, it is not sufficient for the defendants to prove the non-render of tithes in kind; they must distinctly shew the acceptance of the modus for some time, and to some extent.

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plaintiff the tithes of any of the said several matters, but that he had been always ready and willing to pay the amount of the several moduses or customary payments thereafter mentioned, by way of recompence and satisfaction for the same.

The defendant then stated, that each and every occupier of any farm and lands, within the said parish and rectory, had, from time whereof &c., been accustomed to pay, and of right ought to have paid, to the rector of the said parish for the time being, or to his lessee, farmer, or agent, or to the person or persons entitled to receive the same, the sum of sixpence for the fall of every colt, yearly produced or dropped in or upon such farm or lands within the said parish, in lieu of, and in full satisfaction and discharge of, the tithes of foals or colts, brought forth or dropped on the said farms and lands: Also, the sum of one halfpenny for every calf (except they arose to the number of ten calves in the season, and then the sum of 4*d.* a-piece for the ten calves) dropped or produced in or upon the said farms and lands every year, in lieu of, and in full satisfaction and discharge of, the tithes of calves dropped and produced on the said farm and lands respectively. Also, the yearly sum of one penny for every cow's milk, in lieu of, and in full satisfaction and discharge of, the tithe of milk yielded every year in and upon the said farms and lands respectively: Also, the sum of 4*d.* for every hogshead of perry, and so, proportionably, for more or less, made from the pears yearly arising, growing, and renewing on the said farms and lands respectively, in lieu of, and in discharge and satisfaction of, the tithe of pears arising, growing, and renewing in and upon the same farms and lands respectively: Also, the sum of three halfpence for the lamb of every wintered ewe, (that is to say), for each lamb yearly dropped or produced by every such ewe as aforesaid, in and upon the said farms and lands respectively, in lieu of, and in full satisfaction and discharge of, the tithes of lambs

dropped or produced by such ewes as aforesaid, in and upon the said farm and lands respectively. The defendant then alleged, that such moduses had been constantly received.

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The defendant examined several witnesses to prove the existence, and reputation of the existence, of the several moduses, or customary payments, alleged by the answer (a).

The defendant also produced, from the registry of the bishop of the diocese of *Worcester*, a terrier, dated the 5th of *July*, 1714(b).

(a) This evidence, and the effect of it, so far as it is material, is noticed in the judgment.

(b) The following is a copy of the terrier:—

“ A terrier, or particular account of all and every the glebe lands, and tenements, tithes, moduses, *Easter* dues, and other the rights and privileges of or belonging unto the parsonage or rectory of the parish and parish church of *Elmley-Lovett*, in the county and diocese of *Worcester*, certified the fifth day of *July*, in the year of our Lord 1714, by us whose names are hereunder written.” (After describing the parsonage-house, buildings, and lands thereto belonging). “ Great tithes of all kind of corn and grain, as wheat, rye, munchcorn, barley, pease, beans, vetches, powse, and also for hops, *French* wheat, clover, hay, and for all sorts of grain whatsoever, are paid in kind, except for what shall, at any time or times, happen to grow, arise, or be in several parcels of land, formerly called the park in *Elmley-Lovett* aforesaid, in the possession of *Henry Townshend*, Esq., his under-tenant

or under-tenants, containing about a hundred and fifty acres in the whole, for which there is a modus of ten shillings *per annum* paid for all tithes; which said park is bounded on, or near, the north part thereof, with the church-yard, and with the farm lane, and with a piece of land called the *Church-field*; and on the east with one-half part of the yew-tree meadow, leading to the little brook, pointing southward; and also on the east with the wash meadow, and with two pieces of land, called *Sepincutts*, and from thence through the middle of the forest, and the forest pool, and from thence to the lands in the possession of *Ann Hill*, widow; also, on or near the east part, and bounded on the south part with two pieces of land, called *Postle-fields*, and from thence westward to the top of *Snead Green*, and from thence northward with a lane called *Stoken-lane*, towards the church.

“ Small tithes for all kind of tithe wood fallen, or to be fallen, within the parish of *Elmley-Lovett* aforesaid, are paid in kind. The tenth part of all shorn wool. One

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Mr. *Jervis*, Mr. *Tinney*, and Mr. *Harwood*, for the plaintiff, in the first instance relied on the plaintiff's common law right.

Mr. *Simpkinson* and Mr. *Sclater*, for the defendant, contended, that the evidence proved the moduses, and that there was no evidence of any render or payment of tithes in kind. In support of the modus for pears, they cited *Simpson and Tucker*(a), and *Mallock and Browse*(b); and

lamb out of seaven. One pig out of seaven. Sixpence for the fall of every colt. Half-a-penny for every calf, except they arise to the number of ten calves in the season, and then four-pence a-piece for the ten calves. Duck eggs and hen eggs in kind. Honey in kind. Hemp and flax according to act of Parliament. Apples in kind. For every hogshead of perry four-pence, and so proportionably for more or less. The park of *Henry Townshend*, Esq., set forth as above, is exempted from the payment of all small tithes above mencōned. To the Minister, for every marriage, five shillings; to the clerk, one shilling, for the same. To the Minister, for every funerall, one shilling; to the clerk, two shillings. To the minister, for publishing banns of marriage in the church, if the persons shall not happen to be married there, one shilling and sixpence. Three half-pence for the lamb of every wintered ewe.

“Moduses—Ten shillings paid *per annum* for the park above-mencōned, belonging unto *Henry*

Townshend, Esq., in full for all manner of tythes. Four shillings *per annum*., paid for a mill of the said *Henry Townshend*, Esq., situate within the parish of *Elmley-Lovett* aforesaid, having two throws and three pair of stones belonging to the same, at two shillings for each throw. One penny for every cow's milk. The Minister is obliged to keep a bull and a boar.

“Easter dues—Every man and his wife pay twopence for both; for smoak, one penny; for a garden, one penny. Every son and daughter at age, fourpence a-piece.

“There is an antient annuall chiefe rent of ten shillings *per annum*, paid out of the rectory of the parish and parish church of *Elmley-Lovett*, unto the rector of the parish and parish church of *Hartlebury*, within the diocese aforesaid, yearly, on the feast day of Saint *Michael* the Archangell.” Signed by the rector, two churchwardens, and several inhabitants.

(a) 1 Eagle & Younge, 525.

(b) Amb. 423; 2 E. & Y. 197.

in support of the same modus, and of the moduses for milk, calves, and colts, *Roe v. The Bishop of Exeter* (a).

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Mr. *Jervis*, Mr. *Tinney*, and Mr. *Harwood*, for the plaintiff.—The payments are merely temporary compositions, and not moduses. The only moduses stated by the terrier to exist, are the farm modus for Mr. *Townshend's* estate, and the modus for his mill. The terrier contains an enumeration of all small tithes, and not of moduses; but even this is incorrect, for it mentions wood, which is not a small tithe; the moduses for lambs, pigs, and geese, are clearly bad. *Pritchett v. Honeyborne* (b). The modus for turkeys is bad upon the face of it, turkeys being of modern introduction. As to the modus for calves, the evidence of the witnesses is contradictory. The decision in *Simpson v. Tucker* is inconsistent, the modus being held to be bad, and yet established as to part, and an account decreed as to the remainder; and is contrary to *Edgerton v. Follett* (c), and *Short v. Lee* (d). The enumeration in the terrier of small tithes, is conclusive evidence that the moduses did not then exist. *Halse v. Eyston* (e).

The plaintiff, to rebut the evidence of the defendant, produced, from the bishop's registry, a terrier, dated 1635, signed by the rector, two churchwardens, and two inhabitants, containing the following entry: "Tithes and commodities"—"*Item*, There belong to the said rectory all manner of tithes, both great and small, due and accustomedly paid within the precincts of the said parish, and the benefit of all commons, for sheep and other cattle, proportionably, for one yard land; and the liberty of all ancient ways into the several grounds of the parishioners, for transporting the tithes abovesaid."

(a) Bunb. 57; 1 Eagle & Younge, 1757.

(b) 1 Y. & J. 135.

(c) 1 E. & Y. 562.

(d) 2 Jac. & W. 464; 3 E. & Y. 1013.

(e) 4 Price, 487; 2 E. & Y. 597.

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The plaintiff also relied on a parliamentary survey in 1649, which stated the rectory to consist (*inter alia*) "of the tithes, small and great, worth 66*l.* and 10*s.* a-year, in lieu of all tithes for *Elmley Park*, according to a custom, and for the tithe of the mills there, 4*s.*"

Mr. *Simpkinson*, in reply to this evidence, rested on the terrier produced by the defendant; and the evidence of non-payment of tithes in kind; and contended, that the evidence shewed that the compositions were fixed with reference to the modus.

LORD CHIEF BARON, [*after stating the pleadings*].—The view which I take of this case renders it unnecessary for me to examine the mode in which the moduses are laid by the answer. The question I have to consider is, whether there is sufficient evidence to warrant my directing an issue or issues. No person can suppose that I can reject the bill. The only question is, whether, on the evidence, there is sufficient ground to direct an issue. The documentary evidence is inconsiderable. Two terriers are produced, one on the part of the plaintiff, the other on the part of the defendant. That produced on the part of the plaintiff is of the year 1635, in the reign of *Charles* the 1st; that on the part of the defendant is of 1714, about the commencement of the reign of *George* the 1st.

The terrier of 1635 states, that there belong to the rectory all manner of tithes, both great and small, due and accustomably paid within the precincts of the said parish. It mentions no modus of any description. The terrier of 1714 mentions all the moduses, and that respecting pears rather more accurately than it is pleaded; for it states it to be 4*d.* for every hogshead of perry, and it covers only the pears made into perry.

The parliamentary survey was also produced, on the part of the plaintiff. It agrees in substance with the first

terrier. The terrier of 1635 and survey are chiefly important from their silence; but, alone, would not have been sufficient to oppose any distinct usage. On the other hand, a single terrier, unsupported by usage, is totally unequal to establish any modus.

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I have read these depositions carefully, and I am of opinion, that they resolve themselves entirely into this single terrier of 1714, and hardly make it stronger. If the non-render in kind were sufficient, the defendant would have a good case, for the non-render is proved. But he must go farther, and shew the acceptance of the moduses for some time, and to some extent. Of such evidence, the case on the part of the defendant is entirely barren. There are no receipts; no rector's books; no parol testimony whatever, to shew that any such payments were ever accepted by the rector. In a solitary instance only, a witness named *Francis* paid to one *Glaxe*, a collector for the rector preceding the present plaintiff, for three or four years after 1806, those moduses. But *Waldron*, who is one of the witnesses for the defendant, tells us, that, at that very time, and during his incumbency, though he thought the payments due and payable, he refused to receive them. The instance proved, therefore, which, if it had been authorized, could have been of little avail, was not authorized, and therefore, of no avail. *Waldron* says, that he thought these moduses were due and payable, but explains, at the same time, that this opinion was derived solely from the terrier of 1714, of which, it appears, he had a copy. There is some very loose evidence of reputation, but of a very different description from what is usually found in cases in which moduses have been established. The compositions, which appear to have been made with the parishioners, are said to have been made upon the footing of those money payments. But there is no distinct evidence of that fact; no written valuation produced; no written statement of the terms of any one composition.

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The inference I draw from the whole of the evidence upon this subject is, that, there was no general parochial composition; that the compositions were made with individual occupiers; that, in these compositions, the calculation was made upon the great tithes, and a few charges were made upon the occupier, in respect of certain articles of small tithes, but no mention of any *modus*. This would appear to be the case from the evidence of *Jones*, a collector for *Waldron*, the last incumbent, and also for the plaintiff, who deposes to various compositions or agreements having been entered into for several farms, which he describes; and he then states, that the compositions were entered into in lieu of the great tithes of those farms, some little being charged at the bottom of each person's account, for pigs, eggs, wool, and lambs, but not for lambs of wintered ewes.

There is nothing to substantiate the general understanding, that there were such *moduses*, which appears to me to have no other foundation than the *terrier*. Such general understanding, without distinct usage to support it, is not sufficient to enable me to direct an issue. And, if I were to direct an issue, I should run the risk of a Jury mis-carrying, by placing too much reliance on this evidence, and I should not do right to put the parties to an unnecessary expense.

The bill must be dismissed with costs, as to the tithe of lambs of wintered ewes; and there must be a decree, with costs, as to the other tithes demanded by the bill.

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July 20th.

PEARSON and Others v. HOGHTON, Bart.

BY indenture of lease, dated 2nd *February*, 1778, Sir *Henry Hoghton*, of *Hoghton*, in the county palatine of *Lancaster*, Bart., demised to *Henry Heaton*, his executors, administrators, and assigns, divers lands and premises at *Hoghton*, for the term of sixty-three years, from the 13th *February*, 1778, at the several yearly rents therein mentioned; and also, under and subject to the several penal rents therein also mentioned. Among various other covenants and provisions contained in the lease, was a covenant on the part of the lessee, that in case the said Sir *H. Hoghton*, his heirs, executors, administrators, or assigns, should at any time or times thereafter during the term, find and provide any square oak wood for the use of the said *Henry Heaton*, his executors, administrators, and assigns, in the making of any buildings in or upon any part of the said premises, according to the covenant thereafter contained for that purpose, then, and in such case, he the said *Henry Heaton*, his heirs, executors, administrators, or assigns, should and would, not only immediately after the finding and providing thereof, cause the same to be laid out to the best use that could be, in the making of lasting buildings in or upon the said demised premises or some part thereof, but should and would, yearly and every year, for and during so much of the term as should be to come and unexpired from the time and times of finding and providing such wood as aforesaid, pay and allow to Sir *Henry Hoghton*, his heirs, executors, administrators, or assigns, interest for the total amount or value thereof, after the rate of 4%. for the value of every 100%, and so in proportion for a greater or less quantity. The lease, among other stipulations on the part of the lessor, contained a covenant that he the said

In a lease, the lessor covenanted, at any time thereafter during the term, to cause any quantity of square oak wood to be set out within some part of the lands or grounds then belonging to the lessor, as should be wanted for the benefit of the lessee, and to be used in the buildings intended to be made on the demised premises. And the lessee covenanted to pay, and allow to the lessor, interest for the total amount or value thereof, after the rate of 4% per cent. on the value, and so in proportion for a greater or less quantity. Bill by assignees of the lease for an account of what was due under that covenant, and for an injunction to restrain an action brought for a breach of it. A demurrer, for want of equity, was over-ruled.

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Sir *H. Hoghton*, his heirs, executors, administrators, or assigns, should and would, upon request to be made to him or them by the said *Henry Heaton*, his executors, administrators, or assigns, at any time or times thereafter, cause any quantity of square oak wood to be set out within some part of the lands or grounds then belonging to him or his heirs, as should be wanted for the benefit of the said *Henry Heaton*, his executors, administrators, or assigns, and to be used in the buildings intended to be made upon the said thereby demised premises, upon receiving interest for the amount or value thereof, after the rate of 4*l.* for the value of every 100*l.*, and so in proportion for a greater or less quantity.

Henry Heaton entered into possession under and by virtue of the lease.

Sir *H. Hoghton* died in the year 1795, leaving the defendant, Sir *H. P. Hoghton*, his eldest son and heir-at-law, and who, upon the death of his father, became entitled to the reversion of the premises, expectant on the termination of the lease.

The bill was filed by *Ralph Pearson* and ninety-five other persons, against Sir *H. P. Hoghton*, stating, that, by divers mesne assignments, the whole of the property comprised in the lease, with the exception of about twenty acres, had become vested in them for the whole of the term, and that the said twenty acres of land were vested in various persons unknown to the plaintiffs. That the plaintiffs had expended upwards of 30,000*l.* on the premises, with the knowledge and privity of Sir *H. Hoghton* and the defendant. That Sir *H. Hoghton*, in his lifetime, and the defendant, soon after his death, had furnished timber for the buildings erected by the plaintiffs, receiving interest upon the amount or value of such timber; which interest then amounted to the annual sum of 137*l.* That the premises to which the plain-

tiffs were so entitled were of the annual value of 1600*l*. That the defendant had lately commenced actions of ejectment against the plaintiffs, insisting that some breach of the covenants contained in the said lease had been committed by some of the tenants of the other part of the premises, whose names were unknown to the plaintiffs. That the plaintiffs had been unable to discover the particular breach of covenant which had been committed, or the names of the persons by whom the same had been committed; but the plaintiffs had ascertained, as the fact was, that the breach of covenant, in respect of which the said actions of ejectment had been brought, was a breach of the covenant for payment of interest upon the value of square oakwood, furnished by the defendant for the use of such persons pursuant to the covenant contained in the lease; and, consequently was a covenant, in respect of the breach of which, a Court of equity would give relief, on payment of the money due, together with interest thereon, and costs.

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The bill prayed an account of what was due to the defendant in respect of the said breach of covenant, and of the interest and costs due to him in respect thereof, which the plaintiffs offered to pay, and for an injunction, to restrain the proceedings in ejectment.

To this bill, the defendant put in a general demurrer, for want of equity.

In support of the demurrer, it was contended, that the remedy of the plaintiffs, if any, was at law, under the statute (a).

That the bill did not shew that any forfeiture had arisen with respect to the timber, inasmuch as the covenant, on the part of the tenants, was only to pay interest on the amount of the value of square oak, set out within some

(a) 4 Geo. 2, c. 28.

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part of the lands or grounds then belonging to Sir *H. Hoghton*; and it was not alleged by the bill, that Sir *H. Hoghton* had any oak on these lands, or had set out any oak on these lands.

For the bill, it was insisted, that the interest on the amount or value of the oak wood, was not in the nature of a rent, and, therefore, not within the statute; but was a mere covenant, to make a money payment depending on the taking of a previous account. That the timber was, in fact, actually supplied from the estate of Sir *H. Hoghton*; but, whether it was or not, the forfeiture would be the same.

Mr. *Jervis*, and Mr. *Parker*, for the demurrer.

Mr. *Knight*, and Mr. *Sharpe*, for the bill.

LORD CHIEF BARON.—What relief the Court may ultimately give in this suit, I cannot at present say; but I am clearly of opinion, that this demurrer cannot be sustained.

It has been argued, that the plaintiffs' remedy is at law; and, therefore, that they have no equity.

It is stated, though not in the bill, that timber was found in the manner covenanted by the landlord from his estates. I do not think that the necessary construction of the covenant is, that it must be timber furnished from these particular estates, but only, that it must be furnished to the tenants. This seems to me to be the good sense of the covenant. It has been said, that the question is one entirely of law, in consequence of this being a rent. I am not inclined to treat it as a rent. It appears, in point of fact, that there has been a severance of the tenure, and that some other persons have got into possession of part of the estate; then, is there not some danger that there may be a forfeiture by the acts of those other persons?

The case is much too obscure for me to say, that this suit cannot be sustained. There is a multitude of views, in which the plaintiffs, on this statement of the case, may be entitled to relief.

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The Act of Parliament appears to me to operate the other way, for it suspends the proceedings on certain terms, on a bill being filed within a given period. The act, however, relates to rent only.

END OF TRINITY TERM AND SITTINGS AFTER.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Exchequer,

IN

MICHAELMAS TERM, 10 GEO. IV. AND THE SITTINGS AFTER.

MEMORANDA.

IN the vacation, after *Trinity* Term, the Honourable Mr. Baron *Hullock* died at *Abingdon*, whilst on the *Oxford* Circuit.

During this term, on the 16th *November*, *William Bolland*, of the *Middle Temple*, Esq., was appointed one of the Barons of this Court, in the room of the Honourable Mr. Baron *Hullock*, deceased, having previously on the same day been called to the degree of the Coif; upon which occasion he gave rings, with the motto:—" *Regi regnoque fidelis.*" In *Hilary* Term following, the learned Baron was knighted.

1829.

EXCHEQUER OF PLEAS.

ADAMS v. MEREDREW.

THE judgment of this Court, which arrested the judgment for the plaintiff, upon a verdict obtained by him (a), having been reversed by the Court of *Exchequer Chamber* (b), *Hill*, for the plaintiff, obtained a rule, calling upon the defendant to shew cause, why the Master of this Court should not be directed to review his taxation, and allow to the plaintiff his costs occasioned by the motion in arrest of judgment.

Where the plaintiff obtained a verdict, and the Court of *Exchequer* arrested the judgment, which judgment was reversed by the Court of *Exchequer Chamber*:—*Held*, that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the Court of *Exchequer*.

Chitty shewed cause.—There are two questions in this case: the *first*, whether the plaintiff is entitled to costs at all; and the *second*, whether, if he be so entitled, this Court is the proper tribunal to which he should apply. At common law, no costs of suit were allowed. This was remedied by the stat. of *Gloucester* (6 *Ed.* 1, c. 1); but that statute does not apply to costs incurred after the verdict; for, if it did, the stat. 3 *H.* 7, c. 10, which extends to costs in error, would have been unnecessary. In *Wyvill v. Stapleton* (c), in which, upon a writ of error, the judgment of the Court of *Common Pleas* for the defendant was reversed, the plaintiff applied for full costs consequent upon the suit, insisting that he was entitled to such costs by the stat. of *Gloucester*; but the Court said, that, at common law, there were no costs upon any writ of error, and that the statutes 3 *H.* 7, c. 10, and 8 *W.* 3, c. 11, extended only to cases of affirmance of judgments, and that very reasonably; for why should any man, in the case of a reversal, pay costs for the error of the Court below. In *Salt v. Richards* (d), a writ of error was nonprossed, for

(a) *Ante*, Vol. 2, p. 417.

(c) 1 Str. 615.

(b) *Ante*, 219.

(d) 7 East, 111.

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not transmitting the record, whereupon the defendant moved the Court to which the writ of error was directed, for the costs of the nonpross; but the Court were of opinion, that he was not entitled to costs, and *Le Blanc*, J., said, that the stat. 3 H. 7, c. 10, did not contemplate the costs which might grow before the return of the writ of error. If the application to arrest the judgment had failed, and nothing had been said respecting the costs, the costs of that application would have been costs in the cause; but having succeeded, it would be unjust that the successful party should pay the costs which arise from the mistake of the Court. Thus, in motions for new trials, upon the ground of misdirection, no costs are paid, because, as in this case, no blame is imputable to either party, but the cause of the application originates in the mistake of the Judge. But, if the plaintiff be entitled to these costs, this is not the tribunal to which the application should be made. It is clear, that he could not be entitled to these costs so long as the judgment of this Court remained in force; and when that judgment was reversed, if, by that reversal, his right to costs was perfected, those costs must be taxed by the officer of that Court by which the judgment of this Court was reversed. In contemplation of law, the award of the costs is part of the judgment, and supposed to be delivered at the same time; although, in practice, they are subsequently taxed by the officer of the Court. The words of the stat. 31 Ed. 3, st. 1, c. 12, shew, that the application, if made at all, should be made to the Court of *Exchequer Chamber*. That statute directs, that the Lord Chancellor and Treasurer shall cause the record of the process out of the *Exchequer* to be brought before them, and, if any error be found, shall correct and amend the roll. Now, if the plaintiff be entitled to the costs, the roll ought to be amended in that respect by the Court of *Exchequer Chamber*; and not having been so amended, the application to rectify that mistake can

only be made to that Court. Where a judgment of the Court of *Common Pleas* is reversed upon error in the Court of *King's Bench*, the costs incurred in the former are taxed in the latter Court. *Taylor v. Moore* (a).

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Hill, contra.—In consequence of the reversal of the judgment, it is fit that the plaintiff should be restored to the situation in which he would have been, had not the judgment of this Court miscarried; and as there can be no doubt that the plaintiff would have been entitled to costs, had the motion in arrest of judgment been refused, he is now, by the reversal of that judgment, clearly entitled to his costs. It is true, that neither party is entitled to the costs which are occasioned by the mistake of the Court; but these costs were incurred before the judgment of the Court, and must have been incurred, even though the judgment had been in favour of the plaintiff. Upon the question, whether the application should be made to this Court, the decisions applicable to writs of error from the Court of *Common Pleas* to the Court of *King's Bench* should be taken with great caution, because the proceedings are totally dissimilar from those in the *Exchequer Chamber*. Upon a writ of error from the *Common Pleas*, the Court of *King's Bench* has the entire control over the record; execution is issued from that Court, and, if a *venire de novo* be awarded, it is there tried; but the record is sent from this Court to the Court of *Exchequer Chamber* for a particular purpose merely, and is then returned; the execution is issued from this Court, and, in the event of a *venire de novo*, it is tried here. In fact, that Court has no officer to tax these costs, and no process by which the payment of them can be enforced; and, therefore, it would seem to be useless to apply to that Court.

Cur. adv. vult.

(a) 1 Leon. 33.

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GARROW, B., now delivered the judgment of the Court as follows:—This was an action for a libel, in which, upon the trial, the plaintiff recovered a verdict. Upon argument, this Court was of opinion, that the declaration did not contain sufficient prefatory averment as a foundation for the *innuendo*, and, upon that ground, arrested the judgment. Upon this judgment a writ of error was brought in the Court constituted by act of Parliament for that purpose, and the learned Chief Justices, called in to assist the Lord Chancellor upon that occasion, advised the Lord Chancellor to reverse the judgment of this Court, and a rule to that effect was pronounced accordingly. This rule having been pronounced, the party who was the original plaintiff in this Court, and the plaintiff in error in the superior Court, applied to the officer of this Court to tax his costs occasioned by the motion in arrest of judgment, and, upon the Master refusing so to do, obtained this rule, calling upon the defendant to shew cause, why the Master should not be directed to review his taxation. We have carefully considered the subject of this application, and have made inquiry from all sources from which information could be obtained, and, in the result, are of opinion, that this rule should be made absolute. If the plaintiff had succeeded in this Court, he would have had his costs as costs in the cause; but he has been prevented from standing in that position by the judgment of this Court, which we are now bound to assume was erroneous; and it therefore appears to us, that the justice of the case would fail, if the plaintiff were not now to be considered as being in the same situation as if he had succeeded in the first instance. We therefore think, that the plaintiff is entitled to the costs of arresting the judgment. The only remaining question is, whether the application is made to the proper Court. This Court seems to be the only tribunal to which the plaintiff can address himself for the purpose of having these costs allowed. He could not

apply to the Court of *Exchequer Chamber* for that purpose, for that Court has no officer by whom the costs can be taxed, and no process by which the payment of the costs can be enforced. We therefore think that this rule should be made

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DEBT on bond. The defendant *Brown* suffered judgment by default. The defendant *Harries* cravedoyer of the bond, by which it appeared that he was a surety for the defendant *Brown*, and also of the condition, which—reciting that *Brown* was seised in tail of a certain messuage, &c. therein mentioned, subject to a term of ninety-nine years, vested in *Harries* by way of mortgage, to secure 1400*l.* with interest; that the plaintiff had lent to *Brown* 1800*l.* upon the security of the said messuage, &c., and had paid 1400*l.*, part thereof, to *Harries*, and the residue to *Brown*; that *Brown* had by indentures &c., conveyed the messuage &c., to *A. B.*, to make a tenant to the *præcipe*, in order that a recovery might be suffered of the messuage &c., to enure to the use of the plaintiff for ever, with a proviso of redemption upon re-payment of the principal sum advanced, with interest; that *Harries* had assigned the residue of his term for the benefit of the plaintiff, and that the money had been lent and paid by the plaintiff upon consideration of the defendants' entering into a bond for the further securing the re-payment thereof, with interest;—was, “that if the recovery so covenanted and agreed by and between the parties to the indentures, &c., to be suffered of the said messuage &c., should, at

A., with *B.* and *C.* his sureties, entered into a bond to *D.*, the condition of which, after reciting that *A.* was seised in tail of an estate of which he had covenanted to suffer a recovery at a future day, to enure to the use of *D.* in fee, was, that the bond should be void, if the recovery should be suffered “so and in such manner as that, under and by virtue thereof, the estate should be vested in *D.* for ever:” the recovery was duly suffered, but *A.* being seised for life only, *D.* brought an action upon the bond, to which one of the sureties pleaded, that, if *A.* had been seised in tail, the recovery

was suffered so as to vest the estate in *D.* in fee:—*Held*, that this plea was bad, because, the recital in the condition did not estop *D.* from disputing that *A.* was seised in tail, nor release the surety from his obligation, it being the intention of the parties, that *D.* should have an estate in fee.

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2 M 14. 33.

2 G M & R. 721.

S. C. 1 P & J. 352.

the next Great Sessions for the county of *Carmarthen*, be suffered and perfected in all things in the manner and form mentioned in the said indentures, and so and in such manner as that, under and by virtue thereof, and of the said indentures, the said messuage &c., should become and be vested in the said plaintiff &c., for ever, according to the true intent and meaning of the indentures, &c., subject to the proviso of redemption; or, in default of such recovery, if the defendants, or either of them, should pay the principal money and interest, then the bond should be void, otherwise, should remain in full force and virtue." He then pleaded, by his third plea, that the recovery was suffered and perfected, and that, *if* the defendant *Brown*, at the time of the making of the bond, had been seised in tail of the said messuage &c., as in the condition mentioned, the said recovery was suffered and perfected so as, and in such manner as, that under and by virtue thereof, and of the said indentures, &c., the said messuage &c., would have become vested in the plaintiff &c., for ever, according to the true intent and meaning of the indentures, &c. The plaintiff replied, that the recovery was not so suffered and perfected so as, and in such manner as, that under and by virtue thereof, and of the indentures, &c., the said messuage did vest in him according to the true intent and meaning of the indentures, &c. To which the defendant rejoined, that *if Brown* had been seised in tail of the said messuage, &c., the recovery was suffered and perfected so as, and in such manner as, that the said messuage &c., did become vested in the said plaintiff, according to the true intent and meaning of the said indentures, &c. And upon this issue was joined. The defendant *Stephens* also set forth the bond and condition upon oyer, and pleaded two pleas, upon which no question arose.

At the trial before *Vaughan*, B., at the *Hereford* assizes, it having been proved that the defendant *Brown* was seised of the said messuage &c., for life only, and not in

tail, and it having been admitted that the recovery was duly suffered, the Jury found a verdict for the defendant *Harries* upon the issue upon the rejoinder to the replication to the third plea; and for the plaintiff upon the other issues, subject to the opinion of the Court upon the third plea of the defendant *Harries*. No damages were assessed for the plaintiff.

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In *Michaelmas* term, *Taunton* obtained a rule, calling upon the defendants to shew cause, why a *venire facias de novo* should not issue, unless the defendants would agree to refer the amount of the damages to the Master of this Court, or to some person to be named by the counsel on both sides; and why, if they did agree to such reference, judgment should not be entered for the plaintiff against all the defendants for such damages so found, the same as if they had been assessed by the Jury at the trial of the cause, notwithstanding the verdict found by the Jury on the third plea pleaded by the defendant *Harries*.

Russell, Serjt., for the defendant *Stephens*, and *Williams, E. V.* (with whom was *Campbell*), for the defendant *Harries*, now shewed cause.—The defendants do not consent to the reference proposed by the rule, and, therefore, as the reference can only be by consent, the rule is confined to the propriety of awarding a *venire de novo*. This question must be determined upon the pleadings as they are now framed; and if, upon the pleadings, the plaintiff has no cause of action, the rule must be refused; for, being joint, if the plea of either defendant be good, the action must fail as to all. It being admitted that the recovery was well suffered, the effect of the recovery is now only in dispute, and the real question is, whether the surety has not a right to assume, that the recitals in the condition are true, and to say, as in effect the third plea does, assuming the facts to be as here recited, I have performed the condition of my bond. In the note to

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Doughty v. Neale (a), many cases are cited, to shew that the recitals in a bond operate as an estoppel upon the obligor; but it is, however, unnecessary to cite authorities to establish that proposition. Now, the very essence of an estoppel is reciprocity, and if the obligor be bound by the recitals, the obligee must be so likewise. But the intention of the contracting parties is to be collected from the recitals; and if the condition of the bond be larger than the recital, the recital shall restrain it. *Arlington v. Merrick* (b), *Pearsall v. Somerset* (c). Looking to the recitals, therefore, it is clear that the two defendants, *Harries* and *Stephens*, do not guarantee the title of *Brown*, but proceed upon the assumption, that he is seised in tail; for, had any doubt existed upon the subject of his title, those doubts would have been recited in the condition. The recitals are introduced for the sake of perspicuity merely. To explain the condition, it was necessary to set out the indentures; this superinduced the recital of other facts, but the warranty of the defendants is confined to the perfection of the recovery, upon an assumption of the seisin of *Brown*. So limited, the warranty is not nugatory; for, as, without the recovery, no security could be perfected, it was subject to be defeated by the death of *Brown*, between the period when the money was lent and the next Great Sessions, before which no recovery could be suffered. To provide against this contingency, was obviously the intention of the parties; and this purpose having been answered, and a recovery having been suffered, sufficient to vest the estate in the plaintiff, had *Brown* been seised in tail, the condition of the bond has been complied with. Could the condition be said to amount to a warranty of title, this argument would be ineffectual; but no such implication fairly arises upon the terms of it, and it is sufficient for this purpose to say, that it is at least

(a) 1 Wms. Saund. 215, n. 2.

is cited from a marginal note.

(b) 2 Saund. 414. This position

(c) 4 Taunt. 593.

doubtful, and upon that ground the defendants are entitled to judgment, the well-known rule being, that, if the condition be doubtful, it shall be construed for the benefit of the obligor. *Buller v. Wigg* (a).

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Taunton and Evans, John, contra.—The simple question is, whether, looking at the evidence which was given at the trial, it can be said, that the defendants have performed the condition of their bond. It is admitted, that *Brown* was tenant for life merely; and it must be conceded to be the intention of the parties, that the plaintiff should have a good and valid security for his money. The condition is not, that the defendants should go through the mere form of suffering a recovery; but, in language as clear as that intention can be expressed, that the recovery should be suffered, so and in such manner as that, by virtue thereof, the estate should be vested in the plaintiff for ever, subject only to a proviso of redemption. But it is said to be the intention of the parties, to secure the money until the recovery should be suffered, and to guarantee that the recovery should be perfected; and that, in so doing, the defendants guaranteed the life of *Brown* until the next Great Sessions, and incurred a risk. This, however, is not so in point of law; for, where the condition of a bond is prevented from being performed by the act of God, as by the death of the party before the day, the obligor is discharged. *B. N. P.* 164; 1 *Wms. Saund.* 215, (n. 2). Again it is said, that the recitals are to narrow the condition. It may be admitted, that, where the condition is general, and therefore ambiguous, it may be expounded by the recitals: the object of a recital is to expound, but not to limit. A recital does not confine subsequent words by which the intent appears more large; as, if a condition of an obligation recite, whereas a ship is bound to *A.*, and is to return to the port of *B.*, or *London*, or any in *England*, the ob-

(a) 1 *Saund.* 66.

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ligor shall pay 20*l.* after the next return to the port of *B.*, or *L.*, or other port of *England*, or elsewhere, where she makes her right discharge: if she make a discharge at *Venice*, he ought to pay (a). So, the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms; but if any doubt arise upon the enacting part, the preamble may be resorted to, to explain it. *Crespigny v. Whittenoom* (b). The recital is not the language of the obligee, but of the party giving the instrument only. For instance, if *A.*, wanting to borrow a sum of money, should apply to *B.* for that purpose, who refuse to lend it without the security of a third person, and a surety be found, and a bond be given, reciting that *A.* is possessed of money in the bank of *England*, conditioned to repay the money, will the surety be discharged if *A.* has no such funds? But the case is not without authority; for, where an indenture between lord and tenant recited that the tenant held of the lord, by homage, fealty, and 10*s.* rent, and the lord confirmed the estate *salvo antiquo dominico et servitio*, it was held, that though it was indented, and both sealed, yet it was a recital, and all the words of the lord only, therefore it should not estop the tenant to plead *hors de son fee* (c). A written instrument must receive the same construction, whatever be the interest of the party; and the fact of the defendant *Harries* being a surety merely, cannot vary the construction.

GARROW, B.—I regret that the alternative proposed by this rule has not been acceded to, because I think, that the real justice between the parties would be attained at much less expense by a reference, than by the course which the rejection of that alternative has imposed upon the plaintiff. I am of opinion, that that which has taken

(a) Com. Dig. *Parols*, A. 19.

(b) 4 T. R. 793.

(c) Br. *Fails*, p. 4; 18 Vin. 161.

place has left this case in an imperfect state; that it is absolutely necessary, that it should be retried, and that a *venire facias de novo* must be awarded. The decisions alluded to, do not apply to this case, which is clear from all ambiguity and doubt. The relative situation of the parties is this:—*Brown* having mortgaged this property to *Harries*, is desirous of paying off that mortgage, for which purpose the plaintiff is to lend the money; *Brown* is represented as having an estate in tail, which, by the operation of the recovery, is to be vested in the plaintiff in fee, as a security for this money; but, in order to make that security more sure, a bond is executed, conditioned to pay back the money, if the security is not perfected: this is the clear understanding of the parties. Looking to the recitals, it appears, that *Brown* is represented as being seised in tail of the property; and looking further, to ascertain what the defendants undertake to do, we find that they are to suffer a recovery so and in such manner as that, under and by virtue thereof, the property shall be vested in the plaintiff in fee, subject only to the proviso of redemption. But it is said, that the recitals in the condition are to bind the parties as matters of fact; and it is reasonable that it should be so with respect to those who are conusant of those facts. The assertors of the facts are the mortgagor and his sureties, but the mortgagee knows nothing of those facts, and acts upon the assumption of that which they represent. Again, it is said, that this is the case of a surety. Why does a man require more obligors than one, except that he may have a further security? The surety may decline to enter into the obligation, but, if he does enter into it, he must be presumed to have done so with a knowledge of the facts; and, if the principal debtor does not pay the money, he must. To decide otherwise would be to shake the security of every obligation. Without pursuing the case further, it appears to me, that it has been imperfectly decided, and that the rule for awarding a *venire de novo* must be made absolute.

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VAUGHAN, B.—The Court is not imperatively called upon now to express an opinion upon the effect of this plea, because, to raise that question, the parties must again go down to trial; but, having a clear opinion upon that point, I have no difficulty whatever in now expressing it. This is an action upon a bond, to which there are three parties—*Brown*, the principal; *Harries*, upon whose plea this question arises, and who does not stand in the situation of a mere naked surety, because the object of the transaction was to pay off his mortgage; and *Stephens*, who is a mere surety. Now, it is observable, that this question does not arise upon the plea of *Stephens*, but upon the third plea of *Harries*, which is to the effect, that if *Brown* had been seised in tail, as is recited in the words of the condition, the recovery was suffered, so that the estate would have vested in the plaintiff in fee. Supposing the propriety of a *venire de novo* not to have been discussed, the question would be, whether, notwithstanding this plea, which is found for the defendant *Harries*, the defendants would be liable upon this bond. It was not contended, at the trial, that the defendants were entitled to a verdict upon those pleas, which stated that the recovery had been suffered according to the intent of the condition; yet, if the argument to-day be well founded, those pleas would be a complete defence to the action. This I mention, to shew the opinion of the learned person who framed those pleas, who, evidently feeling that the other pleas would not avail the defendant, added the hypothetical plea, upon which this question arises. With a view to ascertain whether this plea does, in contemplation of law, entitle the defendants to a verdict, we must look to the nature of the contract, because the bond must be construed according to the intention and meaning of the parties, as that intention is to be collected from the instrument itself. For that purpose it is necessary, in the first place, to look at the situation of the parties, and the motives by which they were

actuated in the execution of this bond. The object of the principal obligor was, to pay off a subsisting mortgage upon his property, and, for that purpose, to create a fresh mortgage. The object of the obligee was, to advance his money upon the security of an estate in fee. It is quite clear, that he stipulated for that security, and, upon the faith of that, advanced his money. It is also clear, that the estate in fee was not then *in esse*, in consequence of which the principal obligor was to find two sureties, and to give a bond with them, in pursuance of which this obligation was entered into. Now, the condition of this bond recites, that *Brown* was seised in tail of certain premises which he had conveyed to make a tenant to the *præcipe*, in order that a recovery might be suffered, and the estate converted into a fee; and then goes on to state, that the recovery should be suffered so and in such manner as that, under and by virtue thereof, the premises should be vested in the plaintiff in fee. If it had been the intention of the parties merely to stipulate, that the recovery should be suffered, it would have been unnecessary to engraft upon the condition, the words "so and in such manner as that, under and by virtue thereof, the estate should be vested in the plaintiff in fee." But, it is clear that the recovery, which has been suffered, has not this effect; and, therefore, the question arises, whether, upon this state of facts, the condition of the bond has been broken. It is said, that it has not been broken, because the recitals must be taken to be true; that *Harries* must be presumed to have executed the bond, upon the faith that they were true; and that the plaintiff is estopped from disputing that they are true. The doctrine of estoppel has been very properly defined; but that doctrine applies merely to cases where the parties are mutual to the contract, and respectively conusant of the facts which they represent. Probably, the defendants did execute this bond upon the assumption that *Brown* was seised in tail; but their mis-

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take in this respect cannot avail them, for they cannot plead in contradiction of that which is recited expressly under their hands and seals. The cases collected in the note to *Doughty v. Neale* (a) clearly establish this proposition; and the case cited by the plaintiff from *Viner's Abridgment* shews, that the obligee will not be bound by a recital to which he is no party. The language of the condition is clear and intelligible, and cannot be controlled by the previous recitals. I, therefore, am of opinion, that the plea is bad, and that the rule for a *venire de novo* must be made absolute.

BOLLAND, B.—I entirely concur in the judgment which has been delivered, and in the reasons upon which that judgment proceeds. But, there are some points which have been insisted upon in the argument, upon which I feel it my duty to express an opinion. The first is, that a different construction is to be put upon the same instrument in respect of the different interests of the parties. To this doctrine I cannot subscribe, and for this reason—a surety is a party to the bond, his liability is to be collected from the condition, and the condition is as large with respect to him as it is with respect to the principal obligor. Neither can I assent to the proposition which has been stated at the bar, that this is the language of the obligee. So far as appears to us, the obligee never saw this bond until the moment that he advanced the money. He is no party to the bond; and, if it were necessary, the Court might, in my opinion, go further, and say, that, if it were shewn that he had inquired into the circumstances, he would not be bound by the recital. Without going further to inquire, whether the death of the principal would, in this case, absolve the surety,—there are cases in which it would, and some in which it would not have that effect;—we must look merely to the intention of the parties and to the condition

(a) 1 Wms. Saund. 215, n. 2.

of the bond: which is, that the recovery should be suffered, so and in such manner as to put the plaintiff in possession of an estate in fee. The recital is, that he has an estate in tail, which, by the effect of the recovery, was to be converted into an estate in fee. It amounts to a warranty of title, as much as if the parties had covenanted, that *Brown* was seised of an estate in tail. If so, the condition of the bond is not larger than the recitals warrant. The rule for a *venire de novo* must be made—

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CROWDER and Another v. DAVIES and Others.

ASSUMPSIT for an attorney's bill. Plea—*Non assumpsit*. At the trial, before *Alexander*, C. B., at the *Middlesex* sittings, it appeared, that the defendants, as assignees of a bankrupt, had employed the plaintiffs as their attorneys; but, it was admitted, that the plaintiffs had not delivered their bill pursuant to the statute 2 Geo. 2, c. 23, s. 23; whereupon it was objected for the defendants, that the plaintiffs ought to be nonsuited, the following items being, as it was contended, taxable items:—

Attending meeting for choice of assignees, and discussing objections to various claims, which were rejected.

Attending third meeting, last examination adjourned.

Attending the assignees afterwards; as to sending down to *Maidstone*, with instructions for inquiries.

Paid commissioners third meeting.

Attending Mr. V. (the attorney for the opposing creditor) on the attempt of the bankrupt to get released from the *Fleet*, by bailing the action, and on measures for opposing it.

An attorney's bill, for business in bankruptcy, need not be delivered one month before action brought, pursuant to the stat. 2 Geo. 2, c. 23, s. 23.

It is not requisite, that a bill for business in bankruptcy should be taxed under the stat. 6 Geo. 4, c. 16, s. 14, before the commencement of an action.

Attending upon, and concerting measures with, the attorney of the opposing creditor, to resist the discharge of an insolvent, is not such business as will render it incumbent upon an attorney to deliver his bill

one month before the commencement of an action, pursuant to the stat. 2 Geo. 2, c. 23.

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*2. Man. Hq. M.P.
1 L. & M. . 80.
2 L. & J. . 373.*

Attending Mr. V. on preparations for opposing the bankrupt's discharge under the insolvent act, and perusing the act as to his right with reference to the bankruptcy.

Attending Mr. V. on preparations for opposing the bankrupt's discharge under the insolvent act.

Attending on the Insolvent Court on his being brought up, when he was remanded.

Upon this objection, the Lord Chief Baron nonsuited the plaintiffs, giving them leave to move to enter a verdict for the sum ascertained to be due to the plaintiffs upon the balance of their accounts, if they were, under the circumstances, entitled to recover.

Creswell accordingly obtained a rule, calling upon the defendants to shew cause, why the nonsuit should not be set aside and a verdict entered for the plaintiffs: against which—

Jervis, and *Justice*, shewed cause.—If the plaintiffs were bound by the stat. 2 *Geo.* 2, c. 23, s. 23, to deliver their bill one month before the commencement of the action, the nonsuit is right, and the rule must be discharged. That statute provides, that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after the delivery of his bill. In the construction of this statute, it has been holden to apply to all cases in which there is a mode by which the bill may be taxed; and it applies to business done in bankruptcy and insolvency, for both of which there are items in this bill. First, with respect to the business in bankruptcy, the stat. 6 *Geo.* 4, c. 16, s. 14, enacts, that all bills of fees and disbursements of any solicitor or attorney employed under any commission, for any business done after the choice of

assignees, shall be settled by the commissioners; except that so much of such bills as contain any charge respecting any action at law, or suit in equity, shall be settled by the proper officer of the Court in which such business shall have been transacted; and the same, so settled, shall be paid by the assignees to such solicitor or attorney, &c. In *Burton v. Chatterton* (a), it was holden, that a charge for preparing an affidavit of the petitioning creditor's debt and bond to the Chancellor, in order to obtain a commission of bankruptcy, was not a taxable item in an attorney's bill, within the statute 2 Geo. 2, c. 23, s. 23, the affidavit not having been sworn, nor a commission issued: but the ground of that decision was, that there was, in that case, no mode by which that bill could be taxed, whereas, in this, some of the items are for business done after the choice of assignees, which, therefore, are taxable under the statute 6 Geo. 4, c. 16. In that case, the Chief Justice said: "If the commission had actually issued, there is a special provision, by the 5th Geo. 2, c. 30, for the taxation of the bill, at a meeting for the appointment of assignees, by the commissioners, and, after that period, by a Master in *Chancery*; and, I believe, that, where a commission has issued, which has not been proceeded on up to the choice of assignees, the Lord Chancellor has directed a Master in *Chancery* to tax the bill. Here, however, no commission was issued, nor was there even an application for it. We ought to be quite certain, before we nonsuit the plaintiff upon this ground, that there was some authority to which these items could have been submitted for taxation." It, therefore, clearly results from this case, that, although the particular items were not taxable, wherever there is a method by which they may be taxed, the bill must be delivered. But the case of *Collins v. Nicholson* (b), is expressly in point. There, the business done was the obtaining of the bankrupt's certificate, and it was holden, that the plaintiff, before he could recover,

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(a) 3 B. & A. 486.

(b) 2 Taunt. 321.

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must deliver his bill pursuant to the statute 2 Geo. 2, c. 23. So, for business in the Insolvent Court, an attorney cannot recover without first delivering his bill. In *Smith v. Wattleworth* (a), the plaintiff, an attorney of the Court of *King's Bench*, was employed to procure the discharge of the defendant, and brought an action to recover his fees, without first delivering his bill; but it was holden, that he could not recover. It may be said, that the plaintiffs were not employed by the detaining creditor, and that, therefore, this case does not come within the rule; but it is in the option of any creditor to oppose, and, therefore, it must be taken, that the plaintiffs were employed by the defendants to oppose the bankrupt's discharge.

Alderson and Kaye, contra.—The true question is, whether these items constitute charges at law, or in equity: for, if they do not, the case is not within the statute. Every attorney's bill, for whatsoever business, is *quodammodo* taxable by reason of the paramount jurisdiction which the Courts exercise over their officers; but, it does not follow, because the items are thus taxable, that a bill must be delivered before the action is commenced. The distinction between proceedings in bankruptcy, and in equity, was considered in the case of *Ford v. Webb* (b), which was an action of debt upon the statute 2 Geo. 2, c. 23, against the defendant, who was not a solicitor, for acting in the matter of a bankrupt in the Court of *Chancery*. The Court was of opinion, that it was not a proceeding in *Chancery*; and it was observed, that the Chancellor sat in bankruptcy under a separate commission; and that the Judges who were empowered to sit for the Lord Chancellor, as Keeper of the Great Seal, could not sit in bankruptcy. If, then, it be not a proceeding in equity, is it essential that the bill should be taxed under the statute 6 Geo. 4, c. 16? The object of that taxation is to protect

(a) 4 B. & C. 364; 6 D. & R. 510. (b) 3 B. & B. 241; 7 B. Moore, 54.

the estate of the bankrupt; but, although the liability of the estate is limited to the amount ascertained upon that taxation, the parties who employ the attornies, may be individually responsible beyond that amount. If this be the object, the taxation of the bill is not a condition precedent to the commencement of an action for the recovery of the amount; and that such is the object, is clear from the cases of *Finchett v. How* (a), and *Tarn v. Heys* (b). But the nonsuit proceeded on the ground, that the bill was not delivered before the commencement of the action, and, upon the same ground, has been supported in argument. Upon this point the only criterion is, whether the bill contains charges for business at law, or in equity; and, upon this principle, all the cases have proceeded. Thus, an affidavit of debt, sworn before commissioners appointed by the Court, is a proceeding at law; and the allowance of a bankrupt's certificate was formerly supposed, erroneously, to be a proceeding in equity. No facts exist, upon which the objection applicable to the business in the Insolvent Court can arise, because it does not appear, that the plaintiffs were employed by the opposing creditor, or even by the defendants, to oppose the bankrupt's discharge, but merely to confer with the attorney who was so employed.

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The Court took time to consider; and ALEXANDER, L. C. B. now delivered the judgment of the Court as follows:—This was an action by the plaintiffs, as solicitors, against the defendants, as assignees of a bankrupt. At the trial, it was objected, that no copy of the bill, signed, had been delivered according to the stat. 2 Geo. 2, c. 23, s. 23; and, therefore, that the plaintiffs should be nonsuited. The fact, that no bill had been delivered, was not disputed, but it was answered, that this bill was not within the statute referred to, and that the action was maintainable, though no bill had been delivered. Upon this ob-

(a) 2 Campb. 278.

(b) 1 Stark. 278.

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jection I nonsuited the plaintiffs, giving them leave to move to enter a verdict for the sum ascertained to be due upon the balance of their account. The greater part of the bill relates to proceedings under the commission, and is clearly and strictly a demand by the solicitors under a commission against the assignees. Two or three items were pointed out of a different character, which were said to be charges at law. Of these, the following is an instance:—"Attending Mr. *Vincent*, in the attempt of the bankrupt to get released from the *Fleet* by bailing the action, and on measures for opposing it." From this, we understand, that Mr. *Vincent* was the attorney for the creditor, at whose suit the bankrupt was in custody, and that the plaintiffs, as solicitors for the assignees, called upon him to advise with him, with reference to his opposition to the bankrupt's discharge. We do not think that these are proceedings at law by the plaintiffs; and, therefore, are of opinion, that they are not within the statute referred to. It was stated, however, to have been determined, that proceedings in the Insolvent Court were within the statute, and some items were pointed out as coming within that decision. With reference to these, I need only say, that the attendance of the solicitors of the assignees upon the person whose duty it was to oppose the bankrupt's discharge, is not a proceeding under the insolvent debtors' act, and, therefore, that these items do not range themselves within that decision. It was further contended, that proceedings in bankruptcy were proceedings in equity, and, therefore, within the regulations of the stat. 2 Geo. 2, c. 23. We think that they are not. This is manifest from the stat. 6 Geo. 4, c. 16, s. 14, upon which reliance has been placed; for, in directing the bill of the solicitor respecting proceedings in bankruptcy to be taxed by the commissioners, that statute excepts proceedings, either at law or in equity, and directs, that these shall be taxed by the officer of the respective Courts. There is no case establishing any such proposition. We are of opinion, therefore, that no item

in this bill is within the stat. 2 Geo. 2, c. 23, s. 23, and that no copy of it signed, was necessary to have been delivered, according to the provisions of that act.

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Notwithstanding this opinion, we have hesitated much upon the question in this cause. In this statement I include my late lamented colleague, Mr. Baron *Hullock*; and as the delay has been considerable, I think it proper to state the grounds of these doubts. They arise out of the provisions of the stat. 6 Geo. 4, c. 16. We have doubted whether it ought not to have been proved at the trial that the bill had been taxed according to the provisions of that act. The fourteenth section enacts that "all bills of fees and disbursements of any solicitor or attorney employed under any commission, for business done after the choice of assignees shall be settled by the commissioners, except that so much of such bills as contain any charge respecting any action at law or suit in equity shall be settled by the proper officer of the Court in which such business shall have been transacted, and the same so settled shall be paid by the assignees to such solicitor or attorney."

The act requires the bill to be taxed, and directs that, when so settled, it shall be paid by the assignees to the solicitor. This the Court, as then constituted, were inclined to think necessarily imported that, until the bill should be so settled, the assignees were not bound to pay it. This act was made *in pari materia* with the repealed act of 5 Geo. 2, c. 30; and although the phrase is somewhat varied, we believe the two enactments mean the same thing. That act directed, that what should be paid to the solicitor should be what was ascertained upon taxation to be due, "and no more." It seemed to us that it would have been a most salutary construction of the act, that the bill should be taxed, and that it is highly inconvenient that such bills should be thrown without guide or assistance before Juries, who must be utterly incapable of judging as to the proper allowances to be made. Notwithstanding our opinion that this would not have been a strained; and would have been

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a most convenient construction of the statute, we are deterred from acting upon these impressions from what appears to have been held under the late act, in which the words are at least as favourable to this view of the subject as the words of the present statute.

This question arose upon the construction of the statute 5 *Geo. 2*, c. 30, s. 45, before *Gibbs*, C. J., in the case of *Tarn v. Heys* (a); and that learned Judge was of opinion, that the provision of the statute did not affect the right of an attorney against his employers, but only applied to the protection of the estate. In the case of *Arrowsmith v. Barford* (b), the same point was discussed, when the Court of *Common Pleas* were clearly of opinion that a taxation was unnecessary previously to bringing an action against an assignee.

The nonsuit, therefore, must be set aside, and the rule to enter a verdict for the plaintiffs must be made

Absolute.

(a) 1 Stark. 278.

(b) *Ib. n.*

REVENUE BRANCH.

The ATTORNEY-GENERAL v. OVERINGTON.

A retail brewer
of strong beer
under the stat.
5 *Geo. 4*, c. 54,

s. 6, whose brewery is situate in a city or market town, can retail from his brewery such strong beer only as is brewed by him upon his brewery premises.

A retail brewer of strong beer, whose brewery is situate out of a city or market town, and who obtains a licence to retail strong beer in a city or market town next adjoining his brewery premises, under the stat. 5 *Geo. 4*, c. 54, s. 7, can retail at that place only the strong beer brewed by him at his country brewery.

Where a brewer of strong beer, who has two breweries, the one situate out of a city or market town, and the other situate in a city, obtains a licence to retail the beer brewed at the former in the next adjoining city, and another licence to retail that brewed at the latter at the place where it is brewed, he cannot retail at both places the beer brewed by him at his country brewery.

By stat. 5 *Geo. 4*, c. 54, s. 6, a retail brewer of strong beer, whose brewery premises are situate in a city or market town, can only retail there the strong beer there brewed by him; where, therefore, the licence of a retail brewer empowered him to retail at C. strong beer which he should have brewed and be charged with duty thereon:—*Held*, that the licence must be construed with reference to the act of Parliament, and did not empower him to retail at C. strong beer brewed by him elsewhere.

dant, a retail brewer, by retailing beer in another manner, and at another place, than in the manner and at the place which he was authorized to do by his licence, and also for retailing beer without licence. The defendant pleaded—
Not Guilty.

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At the trial, at the Sittings after *Trinity* Term, 1829, before *Alexander*, L. C. B., the Jury found a verdict for the Crown, subject to the opinion of the Court upon the following case:—

“The defendant was a brewer of beer for sale, and occupied brewing premises situate out of a city or market town, *viz.* at *Wickham*, in the county of *Southampton*; and, having made entry of such brewery premises, was duly licensed as such brewer under the provisions of the act 6 *Geo.* 4, c. 81.

The entry for the year 1828 at *Wickham* was as follows:—

I, *Blanch Overington*, of *Wickham*, in the county of *Southampton*, hereby revoke all my former entries, and now make entry of one brewhouse, one mash tub, two coppers, four cooling backs, four tuns, four rooms for stowing beer, as a common brewer, with certain utensils and premises thereto belonging as thereafter described, numbered, and marked, which brewhouse is situated at *Wickham*, in the parish of *Wickham*, in the county of *Southampton*. Witness, &c.

Upon this entry the following licence was obtained by the defendant:—

“We whose names are hereunto subscribed and seals set, being the collector of Excise of *Hants* Collection, and the supervisor of Excise of *Fareham* District within the said collection, in pursuance of an act of Parliament made and passed in the 6th year of the reign of his Majesty King

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George the Fourth, intituled, 'An Act to repeal the several duties payable on excise licences in *Great Britain*, and to impose other duties in lieu thereof, and to amend the laws for granting excise licences,' do hereby license and empower *Blanch Overington*, living at and in the parish of *Wickham*, in the county of *Hants*, and within the said collection, to exercise or carry on the trade or business of a retail brewer at *Wickham* aforesaid, as described by the entry of the said trader, dated the 10th *January*, 1828, for carrying on therein the said trade or business, and as only one separate and distinct set of premises, all adjoining or contiguous to each other, and situate in one place, and held together for the same trade or business, but not elsewhere, from the day of the date hereof until and upon the 10th day of *October* next ensuing. The quantity of beer brewed by such brewer within the year ending the 10th day of *October* previous to taking out this licence exceeding one thousand barrels, and not exceeding two thousand barrels, and he having paid the sum of three pounds for this licence to the said collector of excise.

Dated the 11th day of *October*, 1828."

The defendant being a brewer of strong beer only for sale, and having taken out and paid for his above-mentioned licence to brew at and after the rate of 2*l.* at the least, and his entered premises for brewing being situate out of a city or market town, and he by reason thereof not retailing beer or being licensed to retail beer from such brewery, or making entry of any part of the premises for such purpose, on the 14th *June*, 1828, pursuant to the provisions of the stat. 5 *Geo.* 4, c. 54, ss. 6, 7, made entry of one place for the retail of beer in *Portsea*, being an adjoining market town to his said brewery at *Wickham*, and took out a licence for retailing at *Portsea*, to be drunk and consumed elsewhere, the strong beer brewed by him at his brewery at *Wickham*.

The following is the copy of such entry:—

“ I, *Blanch Overington*, of *Wickham*, in the county of *Hants*, do hereby make entry of two rooms for the purpose of keeping and selling strong beer brewed by me at *Wickham* aforesaid, which rooms are situated in *Mitre Alley*, in *Portsea*, in the said county, and are marked with the letter R. Witness, &c.”

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Upon this the following licence was obtained by the defendant:—

“ *Portsmouth, 7th Division.*

“ *Brewer's Retail Licence.*

No. 149. We, whose names are hereunto subscribed, and seals set, being the collector of Excise of *Hants* Collection, and the supervisor of Excise of *Portsmouth* District within the said collection, in pursuance of an act of Parliament made and passed in the 6th year of the reign of his Majesty King *George* the Fourth, intituled, ‘ An Act to repeal the several duties payable on excise licences in *Great Britain* and *Ireland*, and to impose other duties in lieu thereof, and to amend the laws for granting excise licences,’ do hereby license and empower *Blanch Overington*, living at and in the parish of *Portsea*, in the county of *Hants*, and within the said collection, and being a brewer of beer for sale, and having taken out and paid for a licence to brew, at and after the rate of 2*l.* at the least, to retail strong beer which he or they shall brew and be charged with duty thereon, to be consumed elsewhere than on such premises, (that is to say), to retail the same at and from *Portsea* aforesaid, but not elsewhere, and not to sell any beer to be drunk or consumed upon the premises where sold, or in any shop, house, outhouse, yard, garden, orchard, or other place adjoining the same, or belonging to, or occupied by the said *Blanch Overington*, or on which he hath or shall have any concern from the day of the date hereof until and upon the 10th day of *October*

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next ensuing, he having paid the sum of 5*l.* 5*s.* for this licence to the said collector of excise. Dated the 11th day of *October*, 1828."

Under the above licence, the defendant retailed on the severals days mentioned in the information from such place so entered by him in *Portsea* strong beer brewed by him at his brewery at *Wickham* aforesaid, to be drunk or consumed elsewhere.

On the 10th of *November*, 1828, the defendant made entry of another retail brewery, situate in the city of *Chichester*; and, on the same day, took out a licence as a brewer to brew, and another licence to retail strong beer brewed, and charged with the duty, by him at and from a certain place, being part of his entered brewery premises at *Chichester*, such place not being situated in an adjoining city or market town to his brewery at *Wickham*; of which entry and licence the following are copies:

Copy of Entry.

"I hereby make entry of a retail brewery situated in the parish of *St. Martin*, in the city of *Chichester*, containing one copper and one mash tub, and also of three rooms for storing and selling beer, which rooms are marked with the letter B, and also are numbered, 1, 2, and 3; also two fermenting tuns placed in the store room, No. 3. Witness, &c., the 10th day of *November*, 1828.

Blanch Overington."

Copy of the Defendant's Licence as a Retail Brewer.

"*Chichester*, 3rd Division.

"*Brewer's Licence.*

No. 8. We, whose names are hereunto subscribed, and seals set, being the collector of Excise of *Hants* Collection, and the supervisor of Excise of *Chichester* Dis-

trict, within the said collection, in pursuance of an act of Parliament, made and passed in the 6th year of the reign of his Majesty King *George* the Fourth, intituled, 'An Act to repeal the several duties payable on excise licences in *Great Britain* and *Ireland*, and to impose other duties in lieu thereof, and to amend the laws for granting excise licences,' do hereby license and empower *Blanch Overington*, living at *Chichester*, in the parish of *St. Martin*, in the county of *Sussex*, and within the said collection, to exercise or carry on the trade or business of a retail brewer, at *Chichester* aforesaid (as described by the entry of the said trader, dated the 10th day of *November*, 1828, for carrying on therein the said trade or business, and as only one separate and distinct set of premises, all adjoining, or contiguous to each other, and situate in one place, and held together, for the same trade or business), but not elsewhere, from the day of the date hereof, until and upon the 10th day of *October* next ensuing, he having paid the sum of 10s. for this licence to the said collector of excise; and having, within ten days after the 10th day of *October* next, to pay such further additional sum as shall amount to the duty imposed on licences, according to the number of barrels of beer brewed within the preceding year or period for which this licence is granted. Dated this 10th day of *December*, in the year of our Lord, 1828."

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Copy of the Defendant's Licence as a Retail Brewer.

" *Chichester*, 3rd Division.

" *Brewer's Retail Licence.*

No. 167. We, whose names are hereunto subscribed, and seals set, being the collector of Excise of *Hants* Collection, and the supervisor of Excise of *Chichester* District, within the said collection, in pursuance of an act of Parliament, made and passed in the 6th year of the reign

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of his Majesty King *George* the Fourth, intituled, 'An Act to repeal the several duties payable on excise licences in *Great Britain* and *Ireland*, and to impose other duties in lieu thereof, and to amend other laws for granting excise licences,' do hereby license and empower *Blanch Overington*, living at *Chichester*, in the parish of *St. Martin*, in the county of *Sussex*, and within the said collection (and being a brewer of beer for sale, and having taken out and paid for a licence to brew at and after the rate of 5*l.* at the least), to retail strong beer, which he or they shall brew, and be charged with duty thereon, to be consumed elsewhere than on such premises, (that is to say), to retail the same at and from *Chichester* aforesaid, (being part of the entered brewery premises of the said trader, as described by the entry, dated the 10th day of *November*, 1828), but not elsewhere; and not to sell any beer to be drunk or consumed on the premises where sold, or in any shop, house, outhouse, yard, garden, orchard, or other place adjoining the same, or belonging to, or occupied by the said *Blanch Overington*, or in which he hath or shall have any concern, from the day of the date thereof, until and upon the 10th day of *October* next ensuing; he having paid the sum of 5*l.* 5*s.* for this licence to the said collector of excise. Dated the 10th day of *November*, anno Domini, 1828."

On the 12th *November*, 1828, the defendant, in order to raise fairly the question, upon the true construction of the stat. 5 *Geo.* 4, cap. 54, began brewing at his retail brewery, at *Chichester*, and brewed four barrels, two firkins, six gallons, of strong beer, which, up to the time that the information was filed, was the only brewing he had brewed at his brewery at *Chichester*.

The writ of *subpœna* was tested on the last day of *Michaelmas* Term; 1828.

Of the strong beer brewed by the defendant, at his

brewery at *Wickham* aforesaid, he sent, at other times, several barrels to the place entered by him at *Portsea*, for retailing it; and also, at different times, several barrels of such beer so brewed by him at *Wickham* aforesaid, to his brewery, and to the place at *Chichester*, of which he had made entry for retailing as aforesaid, (being part of such brewery at *Chichester*), and at which he was licensed to sell beer as aforesaid; and which beer, so brewed at *Wickham* as aforesaid, having been received by the defendant at *Portsea* and *Chichester*, part thereof was, on the several days and times mentioned in the information, and subsequently to such commencement of brewing at his retail brewery at *Chichester*, retailed and sold by him as follows, *viz.* part thereof at *Portsea*, and another part thereof at *Chichester*, at the respective places so entered by the defendant, and for which licences had been so granted to him as aforesaid.

The question for the consideration of the Court was, whether the defendant was liable, under the provisions of the stat. 5 Geo. 4, c. 54, or any other act of Parliament, to any penalty for retailing the beer brewed by him at *Wickham*, at any other place than at the place entered by him for that purpose at *Portsea*.

If the Court should be of opinion, that the defendant was so liable for retailing and selling his beer brewed by him at *Wickham*, at and from his premises at *Chichester*, as well as at and from his premises at *Portsea*, then the verdict was to stand; but if the Court should be of opinion, that the defendant could legally do so, then the verdict for the King was to be set aside, and a verdict entered for the defendant.

Walton, for the Crown.—The question in this case is, whether the defendant is authorized to sell by retail, at *Chichester* and *Portsea*, the strong beer brewed by him at *Wickham*. It is not disputed, that he may retail at *Port-*

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see the beer brewed by him at *Wickham*, and at *Chichester* the beer brewed there; but the question is, whether he may retail at both those places the beer brewed at *Wickham*. This depends upon the construction of the 6th (a) and 7th (b) sections of the stat. 5 Geo. 4, c. 54; to un-

(a) Which enacts,—“That it shall and may be lawful for any brewer or brewers of strong beer only, in *Great Britain*, for sale, who shall have taken out and paid for his, her, or their, licence to brew at and after the rate of two pounds at the least, to retail such beer from the premises where such beer is or has been brewed; and for any person, not being a brewer of beer, either for sale or private use, to sell strong beer only, brewed by any other brewer, in casks, containing not less than five gallons, or in not less than two dozen reputed quart bottles at one time, upon such brewer or other person, respectively, taking out, under the provisions of this act, such respective Excise licence for that purpose, as before-mentioned; which licences shall be granted in manner hereinafter mentioned, &c.; provided, that no such licence shall authorize such brewer or brewers, or other person or persons, taking out any such licence respectively as aforesaid, to sell any table-beer, or any beer to be drunk or consumed upon the premises where sold, or in any shop, house, outhouse, yard, garden, orchard, or other place adjoining the same, or belonging to or occupied by the person or persons taking out such licence, or selling such beer, or in which he, she, or they, shall

have any concern, or to sell, deal in, or retail, any other beer whatsoever, or in any other manner whatsoever than respectively as aforesaid; or shall entitle any such brewer or brewers, or other person or persons, to any licence to sell or retail cyder, wine, or spirits.”

(b) Which enacts,—“That where the entered premises for brewing, of any brewer, shall be situated out of a city or market-town, and such brewer shall, by reason thereof, not retail beer, or be licensed as aforesaid to retail beer from such brewery, or make entry for any part of such premises for that purpose, it shall and may be lawful for any such brewer or brewers, to make entry of some one place, room, storehouse, cellar, shop, house, or outhouse, for the retail of beer, in any one adjoining city or market-town; and to take out a licence for, and retail therefrom, the strong beer brewed by him, her, or them, at such brewery as aforesaid, to be drunk or consumed elsewhere; subject, nevertheless, to the several provisions and penalties herein contained and imposed, relating to brewers retailing beer from the premises where brewed: Provided, always, that no retail brewer, not being duly licensed to sell beer, as a keeper of a common inn, ale-house, or victualling-house, shall

derstand which correctly, it may be necessary shortly to advert to the introduction and objects of that statute.

Formerly, two kinds of beer only were allowed to be brewed and sold, and those only in casks, containing four gallons and a half, except by licensed publicans brewing their own beer. By the intermediate beer act, 4 Geo. 4, c. 51 (a), a particular quality of beer was allowed to be retailed by the brewers of that particular quality, to be consumed off the premises. And with the same view the present statute was passed to authorize brewers of strong beer to retail, under certain regulations. This act (ss. 1 & 2), after repealing former licences &c., imposes licence duties on the brewer for sale, on the retail brewer, on publicans, and on dealers in beer not brewers. By these provisions the brewer, who proposes also to be a retailer, must take out, as well a brewer's licence, as a licence to retail; and then, as to the extent and effect of the latter licence, come the sections upon which this question turns. Now, the expressions used in those sections are clear and without doubt. The 6th section gives the privilege of retailing in these terms:—"That the brewer of strong beer, who has paid two pounds for his brewing licence, shall retail *such* beer from the premises where *such* beer is or has been brewed," on taking out a licence. This certainly confines the brewer, retailing from his brewery premises, to the sale of that beer only which is brewed on the premises from whence it is retailed, and he is not by this section entitled to have any other place of sale than the brewery; nor to bring to the brewery for retailing, beer brewed elsewhere. Indeed, to do so, would entrench upon

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deal in or sell any table-beer, or any beer, except the strong beer, which he or they shall brew, and be charged with the duty thereon, or shall, at any one time, use, employ, or consume, any less quantity

than sixteen bushels of malt at any one brewing, upon pain of forfeiting for each and every such offence the sum of one hundred pounds."

(a) Altered by 6 Geo. 4, c. 58.

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the next class of persons named, *viz.* the beer dealer, not being himself a brewer, who may sell strong beer brewed by any other brewer. But, it may happen, that some brewers have premises situated out of a market town, so that they may have upon their premises no opportunity for a retail trade. To obviate this difficulty, and to place the brewer, whose premises are so situated, upon an equality with others, who have the advantage of the trade of a city or market town, the 7th section gives the country brewer, who shall not retail from his brewery, the privilege to enter some *one* place for the retail of beer at any *one* city or market town, and to take out a licence for, and retail therefrom, the strong beer brewed by him at such brewery. No advantage, however, is given by this clause to the country brewer, over the brewer whose premises are situate in a city or market town. The town brewer can only retail from his premises the beer there brewed, and the country brewer by entering *one* place in *one* adjoining town, and retailing therefrom the beer brewed in his country brewery, is exactly in the same situation, the one place of retail being substituted as to the sale of the commodity for the brewery premises. To hold, that the defendant might retail at *Portsea* and *Chichester* the beer brewed by him at *Wickham*, would give him a manifest advantage over the other brewers at *Portsea*, *Chichester*, and the adjoining towns; for, whilst they would be restricted to retail from their brewery premises only, he might have retail establishments for his *Wickham* beer, not only at *Portsea* and *Chichester*, but at every other market town near; for, if he may have more than one place of retail, there is no limit to the number. Upon the construction of these sections, the establishments at *Wickham* and *Portsea*, and at *Chichester*, must be taken to be two separate establishments, and the defendant a distinct trader at each. The beer brewed at *Wickham* can only be retailed at *Portsea*, and that brewed at *Chichester* can

only be retailed there. Indeed, the defendant has designated himself as a separate trader at *Wickham* and at *Chichester*, by taking out his licence for the former place as a brewer previously in trade, and by taking out his licence at *Chichester* as a new beginner, paying 2*l.* under the statute 5 *Geo.* 4, c. 54, s. 9. By that section he would not be entitled to renew his retail licence at *Chichester*, if he were not charged with duty in his brewery there to the extent of one hundred gallons; and he could not resort to his *Wickham* brewery to make up the quantity, because the statute 6 *Geo.* 4, c. 81, s. 10, requiring separate licences for separate premises, provides, that, when the amount or rate of licence duty depends upon the quantity of goods made by the person to whom the same is granted, such quantity shall be computed from the respective goods only made at the premises of which such licence is granted, and shall not include goods made by such person at any other place for which a separate licence is required. If this construction be correct, the defendant has incurred the penalties stated in the information. A different construction would bear heavily upon the publicans, who, being subject to many impositions, are likewise entitled to many privileges, the principal of which would, by the conduct pursued by the defendant, be considerably abridged.

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Alderson, for the defendant.—The literal construction of the 6th section is in favour of the defendant; for if, for the words “such beer,” the words “strong beer” be substituted, it will run thus:—that it may be lawful for any brewer of strong beer only for sale, who shall have taken out and paid for his licence to brew at and after the rate of two pounds at the least, to retail strong beer from the premises where strong beer is or has been brewed. If properly so construed, the words will extend to permit a person who is a brewer of strong beer to retail strong beer on his premises, wherever brewed, because, by the hypothesis, strong beer has been

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brewed there. But it also contains a proviso, which gives a key to the construction of the whole. The section applies to brewers of "strong beer only." It is said, however, to apply only to beer sold from the premises where that individual beer is brewed; but the proviso is, that no such licence shall authorize such brewer, &c. taking out any such licence to sell any table beer, or any beer to be drunk upon the premises. Now, inasmuch as by the preliminary part of the clause, the persons included within it are brewers of strong beer only, it is manifest that such persons could only have table beer as beer not brewed upon the premises; and if a special proviso were necessary to prevent the sale of table beer which must be brewed off the premises, it follows, that strong beer, which is not within that proviso, may be there sold, though it be brewed elsewhere. The seventh section is used as furnishing a construction of the sixth section. But that section is confined to places not being retail breweries, and does not apply to the case in which the same person has two retail breweries. It must be remembered, however, that this information is for selling beer contrary to the licence of the defendant, and, therefore, it is material that the licences should be adverted to. Now, the licence does not confine the defendant to the sale of beer brewed at *Chichester*, and not elsewhere, but licenses and empowers the defendant generally to retail strong beer which he shall brew and be charged with duty thereon. It is not alleged, that the defendant ever sold beer which he had not brewed, or upon which he had not been charged with duty, and, therefore, he has literally complied with the licence. The licence may also be cited to shew the construction which the Excise have put upon the enactment, for the authority to retail beer is not limited to such beer only as is brewed upon the particular premises, but is personal to the party, only limiting the sale to such beer as may be brewed by him, and with which he has been charged with duty. Upon

two grounds, therefore, the defendant is entitled to judgment—*first*, upon the true construction of the statute;—and, *secondly*, upon the words of the licence; for although that may not be consistent with the act of Parliament, still, as the information proceeds upon a breach of the licence, if the defendant has acted in conformity with the licence, he will, upon this information, be entitled to judgment.

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Walton, in reply.—The officers of the Excise can give no greater power than they are authorized to give by the act of Parliament, and, therefore, although the licence is general, it amounts only to a licence to do that which may be done consistently with the statute; and the only question is, what is the true construction to be put upon that statute? It is said that the proviso gives a key to this construction, but the answer to that argument is furnished by the 16th section of the act. That section exempts from the operation of this law, applicable to new breweries, persons in trade before the passing of the act, and who, before then, did sell, from the same brewery, table and strong beer. By the 6th section, these persons are authorized to retail strong beer, but not table beer, and this accounts for the proviso.

The Court took time to consider, and now the LORD CHIEF BARON delivered the judgment of the Court, as follows:—

This case was brought before the Court, in order to obtain our opinion upon the construction of the statute 5 Geo. 4, c. 54, an act relating to retail brewers. I shall refer more particularly, hereafter, to the language of the act itself; but, in order to explain what I am now about to say, it will be sufficient to state generally, that brewers are to make entry of their brewery premises; and that, by this act, it is lawful for them to retail from the premises

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the beer brewed on the premises, upon obtaining a licence for that purpose. This is one of the provisions of the act, by a particular clause; and by another, when the brewery is situated out of a city or market town, as in that case a retail trade would be of little advantage to the brewer, it is lawful for him, upon obtaining a licence for that purpose, to retail from some one place—the word *one* is material in the act—in any adjoining city or market town, the strong beer brewed by him at a brewery not in a city or market town. Of this provision the defendant has availed himself. He is a brewer at a place called *Wickham*, and that not being in a market town or city, he has obtained a licence to retail the beer brewed at *Wickham* in a neighbouring market town, that is, at *Portsea*. He has, in addition, a brewery at *Chichester*, some distance from *Wickham*, and there brews; and *Chichester* being a city or market town, he obtains a licence to retail from the premises of that brewery. Now, the question will be found to turn upon the language of the two sections of the act of Parliament, which were referred to in the course of the argument; and, in order to state the question submitted to the opinion of the Court, in point of fact, it is necessary to remember that the defendant has sent his strong beer, brewed at *Wickham*, and for the retail of which at *Portsea* he has obtained a licence, to his premises at *Chichester*, a distinct brewery; and having obtained a licence to retail from the premises at *Chichester*, he has from thence retailed the beer brewed by him at *Wickham*. Then, under these circumstances, the question for the consideration of the Court is, whether the defendant is liable, under the provisions of this act, to any penalty for retailing the beer brewed by him at *Wickham*, at any other place than the place entered by him for that purpose at *Portsea*; that is, whether he is liable for retailing at *Chichester* the beer brewed by him at *Wickham*, *Portsea* being the only place where it is permitted to him

to retail that beer. If the Court shall be of opinion that the defendant is so liable for retailing and selling his beer, brewed by him at *Wickham*, at and from his premises at *Chichester*, as well as at and from his premises at *Portsea*, then the verdict is to stand for the King; but if the Court shall be of opinion that the defendant could legally do so, then the verdict is to be entered for the defendant.

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Now, it has been admitted, that this question turns upon the construction of the two sections of the act to which I have already alluded. The first (a) is in these words: "That it shall be lawful for any brewer or brewers of strong beer only, in Great Britain, for sale, who shall have taken out and paid for his, her, or their licence to brew, at and after the rate of two pounds at the least, to retail such beer from the premises where such beer is or has been brewed." That is the clause which gives the defendant authority to retail the beer which he has brewed, from the premises where it is brewed. It will appear, and it was so argued, and very properly argued, that the question turns upon the construction of the word "such:" whether the words, "such beer," mean any beer of that description, or whether they mean any strong beer, or beer brewed at the particular brewery of the party appointed for the retail of it by the licence. It is a case of which much cannot be made by argument, but it seems to me, and I understand that all my learned brothers concur in that opinion, that "such beer," means beer brewed upon those premises. It can mean nothing else, it does not mean any beer brewed any where of that description, but it means beer brewed upon those premises, which may be retailed upon the same premises.

The next clause (b) is: "That, when the entered premises for brewing shall be situate out of a city or market town, and such brewer shall, by reason thereof,

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not retail beer, or be licensed as aforesaid to retail beer, it shall and may be lawful for any such brewer or brewers to make entry of some one place, room, storehouse, cellar, shop, house, or outhouse for the retail of beer, in any one adjoining city or market town, and to take out a licence for and retail the strong beer brewed by him at such brewery as aforesaid, to be drunk or consumed elsewhere, subject, nevertheless, to the several provisions and penalties herein contained and imposed, relating to brewers retailing beer from the premises where brewed." Now, this whole scheme seems to me to be quite intelligible and consistent. Where a brewery is erected in a place of considerable population, the excise officers may license a brewer to retail from those premises at that place; and it is worth the while of the brewer to pay for a licence for that purpose; but, when it is not in such a city or market town, then the brewer may apply to have permission to retail his beer brewed in that place in some neighbouring city or market town; and the Legislature has taken particular care to express, that it shall be only one place, only one market town or city. The words of the act expressly limit it to one place in one neighbouring city or market town. It is impossible that words can be stronger. I think, therefore, and I understand that we are all agreed, that the defendant is not warranted by either of these clauses in sending beer brewed at *Wickham*, not a market town or city, to *Chichester*, where he has another brewery, to retail that beer under a licence which ought to be confined to retail beer brewed only at that particular brewery at *Chichester*. We think it is not within the 6th section, which gives him authority to sell upon the spot beer there brewed, because the beer in question was not brewed there; and it is not within the 7th section, because he has already got all the authority which that clause gives him, by having nominated *Portsea* as the place of retail for his

brewery at *Wickham*. It is within neither of these clauses, and it is clearly a breach of this act of Parliament.

It was further said, that the licence gives him authority to retail at *Chichester* the beer brewed at *Wickham*. I admit that the licence is not quite accurately expressed, it may be somewhat equivocal; but still there is no doubt but that the defendant was perfectly aware of the meaning intended to be conveyed; because, as I understand it, he did the act in order to have the question decided. It will be for the Crown to consider whether that will make any difference hereafter; it may be as well they should express themselves more clearly, but it is only equivocal; and, if so, it must be construed according to the authority which the officers derive from the act of Parliament. The language of the particular licence to retail beer from *Chichester*, which the defendant contends authorized him to do this, is thus:—It recites his having a brewery at *Chichester*, and then it authorizes and empowers him, being a brewer, at and after the rate mentioned, to retail strong beer, which he or they shall brew, and be charged with duty thereon, to be consumed elsewhere than on such premises; that is to say, to retail the same at and from *Chichester* aforesaid, being part of the entered brewing premises. Now, the defendant says, that, according to its true construction, the licence authorizes him to send his beer from *Wickham* and sell it at *Chichester*. If we were not informed of what was the object of the act, this might be construed to apply to beer brewed at *Chichester* only; but, when compared with the statute, and considered with reference to the authority under which the licence was given, all doubt upon the subject vanishes.

We are of opinion, that the judgment must stand for the Crown for one penalty.

Judgment for the Crown.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of King's Bench).

EDWARDS v. BENNETT.

An assistant overseer, appointed under the statute 59 Geo. 3, c. 12, is within the statute 17 Geo. 2, c. 3, and liable to a penalty for not producing the rate to an inhabitant when lawfully demanded, if, by his appointment, he be authorized to take care of the poor, or have a limited authority to have the legal custody of the rate.

A declaration for penalties under the statute 17 Geo. 2, c. 3, alleged that the defendant was an assistant overseer, that a rate was duly made &c., and that the plaintiff, an inhabitant, &c., at a reasonable time, demanded an inspection of the rate, and tendered 1s.; and that, although the de-

fendant, as such assistant overseer, had the rate in his possession, he refused to produce it; whereby, &c.:—*Held*, after verdict, that it was sufficient, because the allegation, that the defendant was an assistant overseer, could only be proved by the production of his appointment, in which his duties must be specified; and unless it had appeared, from the appointment, that he had a general authority to take care of the poor, or a limited authority to have the legal custody of the rate, the Judge would have directed the Jury to find a verdict for the defendant.

DEBT upon the statute 17 Geo. 2, c. 3, for penalties. The declaration stated that the plaintiff below (the defendant in error) was an inhabitant of the parish of A., in the county of G., and that, before, and at the time when, &c., the defendant below (the plaintiff in error) was the assistant overseer of that parish; that theretofore, to wit, on &c., at &c., the churchwardens and overseers of that parish made a certain rate for the relief of the poor of that parish, which rate was afterwards and before, &c., allowed by two Justices of the county, and published by the churchwardens and overseers of the poor, &c.; and that afterwards, and at a reasonable time in that behalf, to wit, &c., the plaintiff below requested the defendant below, as such assistant overseer, to permit him, the said plaintiff below, to inspect the rate, and then and there tendered him 1s. for the same; and that, although the said defendant below, as such assistant overseer, then and there had the rate in his possession, he did not, nor would, permit the said plaintiff below to inspect it: concluding with a claim for 20l. as a forfeiture under the statute. Plea—*nil debet*; and issue thereon.

The case was twice argued in the Court of *King's Bench*: on the first occasion, upon a motion for a new

trial (a); and upon the second, upon a rule to arrest judgment, which rule was discharged (b). Upon this judgment the defendant below brought a writ of error, which was now argued by—

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Ludlow, Serjt., for the plaintiff in error.—An assistant overseer is not a person within the meaning of the statute 17 Geo. 2, c. 3, s. 3, which gives the penalty. The persons included within that statute are, “ churchwardens and overseers of the poor, or other persons authorized to take care of the poor.” When that act was passed, an overseer was a public officer, well known by that name, the duties of whose office were perfectly understood. At that time, an assistant overseer was not known as a public officer; for it was then illegal to pay out of the poor rates a compensation to a deputy who might discharge the duties of the principal. By the statute 59 Geo. 3, c. 12, s. 7, assistant overseers were first established (c). The officer so appointed is not a churchwarden; so, neither is he an

(a) 2 M. & R. 482; 7 B. & C. 586.

(b) 8 B. & C. 702.

(c) Which enacts—“ That it shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discrete person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by them executed and performed, and to fix such yearly salary for the execution of the said office, as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his Majesty’s Justices of the Peace, and they are hereby empowered, by warrant, under their hands and seals, to appoint any person or persons who shall be so nominated

and elected to be assistant overseer or overseers of the poor for such purposes, and with such salary as shall have been fixed by the inhabitants in vestry, and such salary shall be paid out of the money raised for the relief of the poor, at such time and in such manner as shall have been agreed upon between the inhabitants in vestry and the respective persons to be appointed; and every person to be so appointed assistant overseer, shall be and he is hereby authorized and empowered to execute all such of the duties of the office of overseer of the poor, as shall in the warrant for his appointment be expressed, in like manner, and as fully to all intents and purposes, as the same may be executed by an ordinary

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overseer, which means an overseer in an unqualified sense, a complete officer under the statute of *Eliz.*; for, where a word of distinct meaning occurs in the statute, it must be taken without qualification. An assistant overseer will not satisfy that definition. He is not an additional overseer, nor a deputy overseer, but a new and distinct officer. He need not be a substantial householder; he is not, in the first instance appointed by the magistrates; he is not compellable to take office; he acts under a contract with the vestry at a salary, which contract is subsequently ratified by the magistrates; the due performance of his duty is secured by bond; and in many other particulars he differs from a regular overseer. The only remaining term within which he can be included, is, a person authorized to take care of the poor. The duties of an assistant overseer are not specifically defined by law, but vary according to the special appointment of each officer respectively. The persons contemplated by these words are, guardians of the poor, chapelwardens, and persons who have authority to make rates; but an assistant overseer has no such power, and is not, therefore, within the act. But, admitting that he may be liable, as a person authorized to take care of the poor, the declaration should charge him in that character, and expressly aver that it was the duty of the defendant below, as assistant overseer,

overseer of the poor; and every person or persons so appointed, shall continue to be an assistant overseer of the poor, until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer; and it shall be lawful for the inhabitants of any parish, upon the nomination and election by them of an assistant overseer or overseers, to require and take security for the faithful execution of

his or their office by bond, with or without a surety or sureties, and in such penalty as they shall think fit; and every such bond shall be made to the churchwardens and overseers of the poor, and may, on any breach of the condition thereof, be put in suit by and in the names of the churchwardens and overseers of the poor for the time being, by the direction of the vestry or select vestry, for the benefit of the parish, in the manner hereinafter provided."

to produce the rate. In an action upon a statute, the plaintiff must aver every thing which is requisite to entitle him to an action. *Com. Dig. Action upon statute (A. 3)*. And although, after verdict, every intendment must be made, yet, nothing can be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. *Spiers v. Parker (a)*. If, then, the possession of the rate, as assistant overseer, furnishes a necessary implication, that it was his duty to permit the plaintiff below to inspect it, the declaration is sufficient; but if there be any other possible purpose for which the rate might be in his possession, it is insufficient, and the plaintiff in error will be entitled to judgment. Now, there are many assignable causes for which he might have the rate in his possession. He might have it for the mere purpose of collecting the rate; or he might have a transitory possession, with a view merely to deposit it in the parish chest; or he might be entrusted with it for a specific purpose, excluding the duty of exhibiting it. The liability attaches upon the person having the legal custody, as distinguished from the mere possession, and the legal custody is subject to the direction of the vestry, by statute 59 Geo. 3, c. 69, s. 6. The circumstances from which the liability arises, must be expressly alleged. Upon this subject there are many cases to which it will be unnecessary to refer. Amongst others, in the case of *Short v. Pruin (b)* it was holden that, in an action against a farmer of the post-horse duties, under the statute 27 Geo. 3, c. 26, for neglect of duty, it was necessary to aver that he was the farmer appointed under and by virtue of that act. So, in *Max v. Roberts (c)*, where the defendants being owners of a ship at *Liverpool*, bound on a voyage from thence to *Waterford*, the plaintiff shipped goods on board, to be carried upon the said voyage by the defendants, and to be delivered at *W.* to the plaintiff's

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(a) Per Buller, J., 1 T. R. 145. (b) 6 T. R. 163. (c) 12 East, 89.

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assigns; and, thereupon, the plaintiff insured the goods at and from *L.* to *W.*, and then averred that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from *L.* to *W.* without deviation, and alleged a breach of such duty, by their causing the ship to deviate from the course of that voyage, after which she was lost with the goods, and the plaintiff, by reason of such deviation, lost his goods, and the benefit of his policy, &c.; it was holden, that the count could not be maintained, because no fact was alleged, from which the law could imply any duty in the defendants with respect to the goods. And in *Rex v. Everett (a)*, where an information stated that *H.* was a person employed in the service of the customs, and that it was his duty, as such person so employed, to seize certain goods; and that the defendant offered to bribe *H.* to violate his duty; the judgment was arrested, because, inasmuch as it was not the duty of every person employed by the customs to seize goods, and the count did not shew that *H.* was a person whose duty it was to arrest and detain such goods, it was bad.

Campbell, for the defendant in error.—If an assistant overseer were not liable to the penalty for not producing the rate, the statute would be repealed, *pro tanto*, in every case in which the rate was in the possession of the assistant overseer; for, if he be unpunishable for refusing to produce it, and the overseer be excused because the rate is not in his possession, the parishioner would be without remedy. An assistant overseer, if appointed with all the powers of the principal officer, is within the provisions of the statute 17 *Geo. 2.* The office is the same, and the only difference is, the mode of appointment; an assistant overseer is a species merely within the genus overseer. Were it otherwise, the parish would be without redress; for he may be invested with all the powers

(a) 2 M. & R. 35; 8 B. & C. 114.

of the principal officer without incurring his liability. The question, therefore, is, whether the declaration sufficiently shews that it was his duty to produce the rate. If the facts be alleged from which the duty originates, the duty itself need not be averred. Upon that principle, the case of *The King v. Everett* was decided. Now, the statute requires, that the rate should be produced; and in order to originate the duty, it is only necessary to shew that he had possession of the rate, and that the production was demanded at a reasonable time. It is said, however, that he might have had possession of the rate for a particular purpose merely, as, for instance, to collect the rates; and that he cannot be bound to produce it to all who may require the production. Under such circumstances, he would not be bound to produce it, because the demand would not be reasonable. He could not have the rate in his possession, except as overseer, and if the production were demanded at a reasonable time, he was bound to produce it. In *Max v. Roberts*, the facts were not stated, from which the duty arose. The principle to be extracted from the case of *The King v. Everett* is, that an allegation of duty is insufficient, unless the facts be stated, from which that duty arises; but if the facts be stated, the allegation of duty is immaterial. That case is, therefore, an authority for the defendant in error; for here, although there is no allegation of duty, the facts are stated, from which that duty may be inferred.

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Ludlow, Serjt., in reply.—The argument for the plaintiff in error would not tend to abrogate or evade the statute; for, although the assistant overseer may not be liable by reason of his possession merely, the party who had the legal custody would be bound to produce the rate. The argument for the defendant in error proceeds upon the fallacy of confounding the mere possession with the legal custody, upon which alone the liability attaches.

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TINDAL, C. J.—In the argument of this case, two objections have been taken. The *first*, that an assistant overseer is not within the statute 17 Geo. 2, which imposes the penalty; and the *second*, assuming, in point of law, that he is within the statute, that he is not liable upon this record. After hearing the arguments, we think that neither of these objections can prevail, and that the judgment ought to be affirmed.

With respect to the *first* objection, the words of the statute 17 Geo. 2, c. 3, s. 3, are:—That, if any churchwarden or overseer of the poor, or other person authorized as aforesaid (that is, authorized to take care of the poor), shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorized as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of 20*l.*, to be sued for and recovered by action of debt, bill, plaint, or information in any of his Majesty's Courts of Record. It is said, that an assistant overseer does not come within either of these descriptions. It may be admitted, that he is not a churchwarden nor an overseer; but, whether he be or be not a person authorized to take care of the poor, will depend upon the nature of his appointment. The statute 59 Geo. 3, c. 12, s. 7, under which he is appointed, enacts, that it shall be lawful for the inhabitants of any parish, in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office as shall, by such inhabitants, in vestry, be thought fit; and it shall be lawful for any two of his Majesty's Justices of the Peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons, who shall be so nominated

and elected, to be assistant overseer or overseers of the poor for such purposes and with such salary as shall have been fixed by the inhabitants in vestry. It must, therefore, depend upon the words of his appointment whether an assistant overseer be or be not a person authorized to take care of the poor; and if they are large enough to embrace all the authority of the superior officer, then, undoubtedly, he would be, within the meaning of the statute, a person authorized to take care of the poor, and liable to the penalty. It would indeed be a narrow construction of this statute to confine its operation to such officers only as were then in existence. It is true, that it could not at the time be intended to apply to assistant overseers, because such officers were not then known; but the Legislature having created an officer, who does come within the description of the statute, it would be a narrow construction of an act, which is not merely penal but remedial, to say that such an officer was not within its operation.

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But, assuming that an assistant overseer is within the terms of the act, still it is said, that, upon this record, the defendant is not brought within its operation. Undoubtedly, if this objection had been taken by way of demurrer, it must have prevailed; but, upon the present occasion, the question is, whether, after verdict, it is not to be intended that the defendant does come within the description in the statute. I have already adverted to the statute under which an assistant overseer is appointed, and by which it appears that his duty is defined by the warrant by which he is appointed. Now, the declaration contains an allegation that the defendant is an assistant overseer, which allegation could not be proved, except by the production of the appointment, or by giving secondary evidence of its contents. Without adverting to any other allegation, the Judge who had the warrant of appointment before him, would direct the Jury that the case was not within the statute, unless by the appointment the defendant had authority to take care of the poor. After verdict we

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must, therefore, assume that the authority of the defendant was such as would satisfy the description in the act. But the declaration further alleges, that the defendant was requested to produce the rate, and had it in his possession as such assistant overseer. At all events, therefore, even if, by his appointment, he had no general authority to take care of the poor, he had a limited authority, part of which was, to have the custody of the rate-books; because we cannot, after verdict, intend that he had the book in his possession, otherwise than in the execution of his duty. The question, therefore, is, whether, after verdict, it must not be intended that he was authorized to have care of the poor, or that it was his duty to have the custody and possession of these books: and in either view of this case the declaration would be sufficient. If this declaration had contained an allegation that the defendant had authority to take care of the poor, no doubt could exist; but as it is doubtful whether he had that or a more limited power, and as the Judge must have directed the Jury to find for the defendant, unless, by his appointment, he came within the description of the statute, we must, after verdict, intend that he had either a general authority to take care of the poor, or a limited authority to have the rightful custody of the books. The case of *The King v. Everett* is distinguishable from this. By the statute upon which that information was founded, three classes of persons were authorized to seize goods, and the officer in that case came within neither of these classes. The answer to that case is, that the defendant was there charged with a crime, and in a criminal case the same indictment ought not to be made.

It appears to us, that, on neither of the grounds, should the judgment be reversed; but, on the contrary, that it should be—

Affirmed.

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EXCHEQUER CHAMBER IN EQUITY.

YOUNG, Clerk *v.* MERCHANT.

July 24th,
Nov. 12th.

BILL, by the vicar of *Layston*, in the county of *Hertford*, against an occupier, for an account and satisfaction of all tithes, great and small, (corn and grain only excepted), from *Michaelmas*, 1828.

A party setting up an exemption from vicarial tithes for part of his farm, as being the demesne lands of a priory or monastery, the tithes of which were excepted from the endowment of the vicar, is bound to prove, that his lands actually were the demesne lands; and it is not sufficient for him to shew that the priory had a manor and lands in the parish; that, on the dissolution of monasteries, the manor and lands devolved to the Crown, by whom the same, together with the rectory, were granted to persons under whom the defendant claimed title; and that the defendant's farm was known by the name of the *Manor Grange*, which, it was insisted, meant the demesne lands:

The defendant admitted the institution and induction of the plaintiff. That he had been informed, and believed; that long previously to the endowment of the vicarage, the church and rectory of *Layston* were appropriated and belonged to the priory of the *Holy Trinity* in *London*; and that at the time of the endowment of the vicarage of *Layston*, and long previously thereto, the prior and canons of the said priory were seised of the manor of *Alswick*, and of the grange, or farm and lands called *Alswick-Hall*, or *Alswick-Manor Grange*, or *Farm*, thereafter mentioned, save and except forty-seven acres and a half, formerly described as forty-nine acres and nineteen perches and three-fourths of a perch, which then formed part of the said farm, called *Alswick-Hall*, and were thereafter mentioned to have been purchased and added to the said grange or farm; and the defendant had been informed, and believed, that, at the time of the endowment of the vicarage, the said grange or farm called *Alswick-Hall*, with the exception of the forty-seven acres and a half, or forty-nine acres and nineteen perches and three-fourths of a perch, formed part of the demesne lands of the priory; and that, in the endowment of the vicarage of *Layston* of

and, therefore, where a defendant set up such an exemption, but did not actually prove that his lands were the demesne, and there was evidence of the receipt for a century past of a composition for tithes for the farm in question, though alleged by the defendant to be paid for a part of the farm only, which he admitted not to be demesne lands:—The Court decreed an account, with costs.

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the vicarial tithes of the said parish, the demesne lands of the said priory within the same were specially excepted out of such endowment, so as not to be made subject to the payment of such vicarial or small tithes; and the defendant, therefore, denied, to the best of his knowledge and belief, that the plaintiff, as vicar, was, by endowment, prescription, or any other means, entitled to the tithes of all or any titheable matters or things whatsoever, yearly growing, renewing, arising, and increasing, in or upon the said grange or farm and lands of *Alswick* aforesaid, except the said forty-seven acres and a half, or forty-nine acres and nineteen perches and three-fourths of a perch, or any lands whatsoever which, at the time of the said endowment, were part of the demesne lands of the said priory, no tithes or composition for tithes having been paid at any time to the knowledge or belief of the defendant, except for the said forty-seven acres and a half, or forty-nine acres and nineteen perches and three-fourths of a perch, and except also as thereafter mentioned, for or in respect of the said grange, or farm and lands, or any part thereof.

The defendant admitted his occupation of a farm and lands called or known by the name of *Alswick-Manor Grange*, or *Farm*, or *Alswick-Hall*, being the manor, grange, or farm and lands thereinbefore mentioned; and that so much of the said farm as was situate within the said parish of *Layston*, or the titheable places thereof, consisted, (including the site of the farm-house and buildings, and the yard and garden), of 283 acres or thereabouts; and that the whole of the said 283 acres or thereabouts, with the exception of the aforesaid forty-seven acres and a half, or forty-nine acres and nineteen perches and three-fourths of a perch, at the time of the endowment of the said vicarage, were part and parcel of the said grange, or farm and lands, called *Alswick-Hall*, or *Alswick-Manor Grange*, or *Farm*, and, at the time last aforesaid, were part of the demesne lands of the said priory, and therefore not

subject to the payment of tithes to the plaintiff as vicar of the said parish. *Exch. Ch. in Eq.*
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That, in the 23rd year of King *Henry* the 8th, the then prior of the monastery or priory of the *Holy Trinity*, or *Christ Church*, in *London*, and the canons of the same house, by deed, under their conventual seal, gave and granted unto the said King *Henry* the 8th, his heirs and successors, all the said monastery and priory, and all lands, tenements, and hereditaments thereto belonging; which said deed was afterwards confirmed by an act of Parliament passed in the 25th year of the reign of the said King *Henry* the 8th; and that, at the time of such grant or surrender as aforesaid by the said prior and canons of all their possessions to the said King *Henry* the 8th, the said manor, and the said grange, farm, and lands of *Alswick* respectively, except the said forty-seven acres and a half, or forty-nine acres and nineteen perches and three-fourths of a perch, belonged to and formed part of the demesne lands of the said priory, and passed by the said grant or surrender to the said King *Henry* the 8th, and were afterwards granted by him to one *Thomas Gray*; and that afterwards, and in or about the year 1581, the same became the property of one *John Crouch*, to whom they were conveyed in fee; and that the said *John Crouch*, in or about the year 1587, purchased the said forty-seven acres and a half, then called forty-nine acres and nineteen perches and three-fourths of a perch, of one *Michael Harris* and *Margaret* his wife, by whom the same were conveyed to him in fee; and the said forty-seven acres and a half or forty-nine acres and nineteen perches and three-fourths of a perch became annexed to the said grange, or farm and lands, called *Alswick-Hall*; and that the said grange, or farm and lands, including the said forty-seven acres and a half, or forty-nine acres and nineteen perches and three-fourths of a perch, by divers conveyances, acts, and assurances in the law, became the property of *John*

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Archer Houblon, Esq., under whom the defendant held the said farm, called *Alswick-Hall*, or *Alswick-Manor Grange*, or *Farm*; but that, under and by virtue of an act for inclosing certain lands in the parish of *Great Horstead*, and the powers thereby given to the commissioners to make exchanges, some pieces or parcels of land, as well of the said forty-seven acres and a half, or forty-nine acres and nineteen perches and three-fourths of a perch, as of the other parts of the said grange or farm, were taken therefrom, and other allotments made in lieu of or in exchange for the same.

The defendant admitted his perception of titheable matters, and that the plaintiff was entitled to the tithes of certain of the said titheable matters and things, that is to say, to such of the said titheable matters and things as were growing, renewing, arising, or increasing upon so much and such part of the lands situate in the said parish of *Layston*, in the occupation of the defendant, as were not part of the demesne lands of the said priory at the time of the endowment of the said vicarage, and consisting of forty-seven acres and a half, or forty-nine acres and nineteen perches and three-fourths of a perch, or the lands given in exchange for some part thereof as aforesaid; but in regard to the tithes of the said titheable matters and things growing, arising, or increasing upon the remainder of the said grange, or farm and lands, and which, at the time of the said endowment, were part of the demesne lands of the said priory, the defendant insisted, that the plaintiff had no right or title thereto, or to have the same set out and rendered to him, the said demesne lands having been exempted by the terms of the endowment from the payment of vicarial tithes.

The defendant then stated, that upon his first entering into the occupation of his farm, in 1804, a composition was paid by him to the vicar for his tithes, which composition the defendant understood to be payable in respect of all

his lands, except the demesne lands, and that he continued to pay such composition until the year 1820: that, in the year 1821, the plaintiff demanded a larger composition, as a composition for the tithes of all the defendant's lands, including the demesne lands, and which the defendant consented to pay, upon the express understanding, that, if it should turn out that only part of the lands was liable to tithes, the plaintiff should return the over-payment. That the defendant continued to pay the increased composition until 1823, when he received notice from his landlord not to pay the same.

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The defendant submitted to account to the plaintiff for the tithes of the other lands, except the demesne lands, and claimed to set off the excess of the composition paid by him as before mentioned, and certain sums, paid by him into the Consistory Court in a suit for the tithes, against what might be found due to the plaintiff.

Both parties entered into evidence.

The evidence on the part of the plaintiff consisted of parol testimony of reputation, that *Alswick* was within the vicarage, and liable to the payment of tithes; and vicars' books, commencing about the year 1670, and continued to the year 1770, the books containing an entry to this effect:—"Tithes for *Alswick*;" and then followed the sum received. The first payment stated, was 2*l.* 13*s.* In 1674, the payment appeared to be 2*l.* 10*s.*, besides 4*d.* for each lamb. In 1714, it was 3*l.* 1*s.* In 1715, 4*l.* 14*s.* 8*d.* In 1745, 4*l.* 15*s.* 8*d.*; and swine 2*s.* 6*d.* The sum then varied in several years, being sometimes more and at other times less, down to 1770, when it was 6*l.* 17*s.* In the subsequent books the sum was much increased.

The evidence on the part of the defendant consisted of an office copy of a rental of the manor of *Corney*, extracted from a chartulary of the monastery of the *Holy Trinity*, 48 *Edward* 3rd; from which it appeared, that many lands and tenements in *Alswick* were held of the manor;

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and that one *William Oliver* and *Margaret* his wife, paid 1*d.* once in the year for a tenement called *Downehalle*, with its appurtenances. An office copy of a grant 25 *Hen.* 8, from the King to Sir *Thomas Audley*, of, *inter alia*, the manor of *Cornbury*, and the rectory of *Leiston*, and all messuages, &c. in *Cornbury*, *Leiston*, and elsewhere, parcel of the possessions of *Christ Church*, *London*. An office copy of a grant 26 *Hen.* 8, to the same Sir *Thomas Audley*, of all messuages, tithes, &c., which the late prior of *Christ Church* had in *Cornbury*, *Leiston*, &c.

The defendant also produced, among other antient deeds, a conveyance, 26th *September*, 16 *Elix.* (1574), from *John Felton* and his wife, to *William Aylofffe* in fee, of the reversion of a messuage, and certain lands called *Alswicke* or *Downeshall*, and a conveyance, 25th *May*, 24 *Elix.*, 1582, from *William Aylofffe* and his wife, of the same premises, to *John Crouch* in fee. A grant, 25 *Elix.*, from Lord *Thomas Howard*, son and heir of Lady *Margaret*, daughter and heir of *Thomas*, late Lord *Audley*, to *John Crouch*, of the manor of *Cornbury* and the rectory of *Leiston*. A conveyance, 10 *March*, 30 *Elix.*, 1587, from *Harrys* and wife to *John Crouch* in fee, of certain parcels of land, containing forty-nine acres nineteen poles and three-quarters, situate in *Leyston*, *Hormead*, *Wydgell*, and *Alswick*. An *inquisitio post mortem*, 4 *James* 1, by which *John Crouch* was found to have died seised of the manor, mansion-house, or farm, called or known by the name or names of *Alswick* and *Downeshall*, then lately purchased of *William Aylofffe*, Esq., and of the manor of *Cornbury*, and the rectory of *Leiston*, and advowson of the vicarage, and the chapel of *Alswick*, then lately purchased of *Thomas Lord Howard*. The lands conveyed by *Harrys* and wife were also mentioned in this inquisition.

The defendant also gave in evidence a paper writing, which he proved to have been delivered by the plaintiff to

the steward of the defendant's landlord as the endowment or the foundation of the vicar's title to the tithes of the vicarage, including *Alswick*; such paper writing purporting to be a copy of the original endowment of the vicarage of *Layston*, taken out of *Newcourt's Parochial History of the Diocese of London* (a).

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The defendant also examined several witnesses, to prove the boundaries of the farm, and the reputation that no small tithes were payable for it, except for the forty-nine acres.

Mr. *Jervis*, and Mr. *Turner*, for the plaintiff, relied on the perception by the vicar, for a century past, of a payment for the tithes of *Alswick*, as evidenced by the receipts.

Mr. *Boteler*, and Mr. *Blenman*, for the defendant, insisted, that the instrument which the plaintiff had sent to

(a) The following is a copy of the document:—"To all the sons of our holy mother the church, *Richard*, by divine mercy, minister of the church of *London*, wisheth salvation in the Lord: It is the object of our episcopal duty not only to cherish more favourably religious persons, but also their possessions and goods, whereby, in the service of God, they may more amply be sustained; and to confirm and strengthen them by authentic instruments; wherefore we being mindful of the religion and decency of behaviour of our beloved sons in Christ the canons of the *Holy Trinity, London*, and following the footsteps of *G.*, Bishop of *London*, our predecessor, the church of *Lefston church (Leyston)*, with its appurtenances, to them by *Hugh Tricket* granted, and by authority

of our aforesaid predecessor confirmed, as in their charters, which we have inspected, manifestly appears, to have to them, and perpetually to be possessed, we do grant, and by the episcopal authority in which we preside, we do confirm, appointing, that, for the more ample sustentation of the house and canons, they shall have and convert all the tythes of sheaves (*garbarum*) to their proper uses; and the perpetual vicar, whosoever he may be, upon the presentation of the canons that shall minister in the same church, shall have for his support all other tythes, (*except of their demesnes*), and all obventions to the church appertaining, and the free land of the church, with the houses and rents of men holding the same free land."

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the defendant's lessor as the endowment, shewed that he was not entitled to the tithes of the demesne lands of the priory. That the farm of the defendant, with the exception of the forty-nine acres, comprised the demesne, could not be doubted; the farm being distinguished as *Alswick-Manor-Grange* (a), and being proved by the documents in the cause to have been part of the possessions of the priory. That the amount of the sum paid for tithes shewed that it was paid for the forty-nine acres, and not for the entire farm.

LORD CHIEF BARON.—The plaintiff is the vicar of *Layston*, in the county of *Hertford*. The bill is brought for all tithes, except corn and grain, of a farm within that parish, called *Alswick-Grange* or *Manor-Farm*. The plaintiff proves that he is vicar, and proves also the defendant's occupation.

The defendant contends, that the vicar of the parish is not entitled to the vicarial tithes of the farm occupied by him, because, as he alleges, though the vicar may have been endowed by general words of the tithes of the parish, saving only corn and grain, yet, that the general words by which he was so endowed were further limited, by the exception of all the demesnes of a monastery to which this benefice was appropriated.

The general principles applicable to cases of this description are too trite to be mentioned. A vicar, having no common law right, must shew, either an endowment, or a usage from whence an endowment may be inferred,

(a) *Grange*, according to *Wharton*, is strictly and properly the farm of a monastery, where the religious deposited their corn; but, according to *Lindwood*, it is a house or building not only where corn is laid up, as barns be, but also where there are stables for horses, stalls for oxen and other cattle, sties for

hogs, and other things necessary for husbandry. *Grange est un hays ou ferm, non seulement pour le repaier de frument, ou aucun autre sort de grain, mais aussi, edifices pour garons, porcs, bœufs, &c., et pour le grant de un grange, tiels lieux passeront.*—*Termes de la Ley*.

entitling him to the tithes in question. In this case, an endowment is mentioned, but I understand it to be taken from a printed history of the diocese of *London*, and I am not apprised that any copy is produced from any ecclesiastical repository, affording legal evidence of such a document. The secondary evidence, the usage, however, it is said, renders this deficiency of less importance, as it shews the actual receipt of the small tithes of the parish, and even points particularly to the small tithes of the farm in question. If this be true, it will impose upon the defendant the necessity of establishing his exemption.

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There appears to me to be quite sufficient evidence of the receipt of tithes. In fact, it is not denied. It is not disputed, that certain sums of money were paid to the vicar for tithes of this farm, and that the evidence carries this back habitually as far as the commencement of the last century. The evidence consists of vicar's books. [*His Lordship then noticed the entries in the books.*] It appears that at a late period a much larger sum was paid; but as this payment was made after the question was foreseen, and upon condition that it should not affect the right, the fact cannot, with justice and propriety, be used in the argument on either side.

The circumstance in these entries, which the course of reasoning in the cause renders it important to recollect, is, that these are all entries for the tithes of the farm of *Alswick* in general terms, without there being in any one instance any allusion to a division of the farm, or any hint that the sums paid were for the tithes of any particular portion of it. At first sight, therefore, no man could doubt that the vicar was entitled to the tithes for which these sums were paid, in other words, to the tithes of *Alswick*.

In order to get rid of this conclusion, the defendant says, that there are forty-nine acres or thereabouts of this farm which are held by a different title from the rest, but which pass under the same name, of which he admits

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the tithes are due to the vicar, and for which alone he avers the composition was paid. It does, in my opinion, sufficiently appear, that the defendant's lessor has forty-nine acres held under a title differently deduced from the rest, and which is, in name, united with the rest. But this does not prove that the money was paid for the tithes of that portion of the farm only. If this had been proved *aliunde*, it would have accounted for the singularity. Of itself, it affords no evidence whatever of such a severance. Now, I cannot find any where upon the record, or in any document which has been produced, the least intimation of this important circumstance. All the evidence respecting the actual payments leads to a different conclusion, and proves, that the payments were made for the whole farm. The possibility that it might be otherwise; does not establish the fact, that it was otherwise; and upon this occasion, it is incumbent on the defendant to establish the fact.

It seems to me, therefore, established, that tithes have been regularly, in the form of a composition, paid for this farm for more than 100 years. Not only, therefore, does the defendant fail in establishing a point, the most important for his cause, but the contrary of that point is established against him. He has not, in support of the antient title, on which he founds his exemption, that usage, in favour of which, it is the wise practice of all Courts to presume from old deeds where they afford it any colour, whatever is necessary to give it a legal commencement and continuance. A defendant cannot be placed in more difficult circumstances.

I will now turn my attention to the question on the title. It has been supposed, that the title, on examination, will defeat the inference to be drawn from the long usage. The proposition, on the part of the defendant, is, that the endowment excepts, from the donation of the small tithes, the tithes of the demesnes of the priory, or the monastery,

or by whatever other name the Ecclesiastical Corporation was known: that this farm was the demesne referred to in the endowment; and the conclusion is, that the vicar is not entitled to the tithes of this farm.

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The endowment is, in evidence, in a very questionable shape. It is produced as having been given to the agent of the defendant's landlord by the plaintiff as his title to the tithes. There is no copy of any record that I can find. The paper is made evidence by a sort of *argumentum ad hominem*. I will, however, consider it. The language of it imports that which is contended by the defendant. It is in these words, as translated:—"The house and canons shall have and convert all the tithes of sheaves to their proper uses; and the perpetual vicar shall have for his support all other tithes, except of these demesnes, and all obventions to the church appertaining." I am not informed of the date of the supposed endowment. But I find nothing in the documents which renders this circumstance important. The question upon this part of the case must be, whether it appears, that, at the time of the endowment, these lands were the demesnes of the priory. This is a question of fact.

I must again repeat, that this case, on the part of the defendant, is defective in one of the most important particulars, *viz.* a modern usage corresponding with his position: as, on the one hand, the fact would have justified the usage, and accounted for it; so, on the other, the usage in its turn would make the fact more probable; would give weight to slight circumstances tending to prove it; and a favourable construction to loose and doubtful phrases in the antient instruments. But, the usage here is not favourable to the defendant. On the contrary, it is adverse to him. I am not able to collect from the instruments any thing to supply this deficiency. The demesnes of the manor are, according to the best glossaries, the lands in the actual occupation of the monastery for their suste-

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nance. I do not doubt, however, that this word may, from circumstances, receive a larger interpretation. But I cannot find any evidence that they were at any time the property of the priory.

Without entering into any detail, for which indeed the materials have not been furnished to me, I assume, in favour of the defendant, that his landlord can shew a title to the farm in question from and under *John Crouch*.

What *John Crouch* had, is collected from the *inquisitio post mortem*, of the 4th year of *James* the 1st, about 1607. From that document, it is to be collected, that he was seised of the manor, mansion-house, and farm, called *Alswick* and *Downeshall*, within the parishes and fields of *Leyston*, *Alswick*, *Great Hornead*, *Westmill*, and *Buntingford*, then lately purchased by *Crouch* of *William Aylofffe* and *Alice* his wife. And further, that he was seised of the manor of *Cornbury*, with divers lands and hereditaments, in, among other places, *Leyston* and *Alswick*, and the rectory of *Leyston*, with all the tithes of grain in those places to the rectory of *Leyston* appertaining, which he had then lately purchased of Lord *Thomas Howard*, at that time Earl of *Suffolk*, and Lady *Catherine*, his wife. There is then also mention of the forty-nine acres, as purchased of one *Harris* and *Margaret*, his wife. There is nothing in this document to shew that this farm was demesne of the priory. It mentions only, that it was purchased of *William Aylofffe*, and *Alice*, his wife. I am furnished, not with these deeds from *Aylofffe*, but with abstracts of them. And as no copies of the deeds are sent me, I presume, copies would not have furnished any more information material to the point, than I can collect from the abstracts.

[His Lordship then referred to the conveyances of the 16th, 24th, and 30th years of Queen *Elizabeth*.]

These are the whole of the documents which mention this farm distinctly. The title goes no farther back than

this *William Aylofffe*, and to the 16th of *Eliz.*, and it is not in any degree connected with the priory, much less does it afford any evidence that the farm was demesne of the priory.

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There is in evidence another class of documents, which trace clearly the title of the premises to which they relate from the priory, and in the usual way through the Crown, to this *John Crouch*. The defect of the argument founded on them is, that they do not clearly refer to this farm, *Alswick*, still less do they refer to it as demesne of the priory; and this construction deriving no support from modern usage, there is nothing to warrant it.

The *inquisitio post mortem*, already stated, finds that *Crouch* was seised.

The grants to Sir *Thomas Audley* sufficiently establish that a considerable portion of the possessions of the prior and monastery were granted to Sir *Thomas Audley*, and, therefore, as *Crouch* claimed under him, would have supported any possession, which *Crouch* appeared actually to have had, under colour of that title.

An earlier document furnishes sufficient ground for the description in the grant to Sir *Thomas Audley*, of the premises therein contained, as having been the possessions of the prior and monastery. It is a charter of 11 *Hen. 3*, that is, of the year 1227, confirming to the prior and canons, the land of *Cornera*, the church of *Lefston-church*, and the chapel of *Alswick*. None of the documents, separately, nor all together, shew, that the farm called *Alswick* was the demesne of the prior and monastery at any time, either at the dissolution or endowment. I have said, that the deeds which distinctly specify the farm, do not mention the monastery, and they are prior in point of time to those from Lord *Thomas Howard*, under which it is now sought to cover the farm in question. These last are so loose and general, that no reliance can be placed upon them; and the construction sought to be put upon them is rather con-

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tradicted than supported by every instrument collateral or subsequent to them.

I have not as yet noticed a document, which, I presume, is supposed to be material. It is a rental of the manor of *Corney*, of 48 *Ed.* 3, that is, of the year 1375. It mentions, as held of the manor by one *William Oliver*, and *Margaret* his wife, a tenement, called *Downhall*, at a rent of 1*d.* The farm in question is called *Downhall*, and this, no doubt, is some evidence that this tenement was within the manor of *Corney*, but certainly is no evidence that it was the demesne of the lord. It has, so far as it has any effect, a contrary tendency, because it is stated to be in the tenure of strangers, at a small rent.

I have now noticed all the documents that have been given in evidence. It is an ungrateful task to state deeds and instruments only for the purpose of shewing that they prove nothing. I have done so upon this occasion, lest it should be apprehended that I had overlooked them. I have examined them with all the attention in my power, and I have arrived at the conclusion, that the defendant has failed entirely in establishing his case.

It will be recollected, that he is bound to prove the farm of *Alswick* to have been the demesnes of the prior and monastery, and that no one circumstance proves it; but that the weight of the evidence is the other way.

The case has been presented in an aspect somewhat different from that I have been now discussing. I have examined whether this farm was exempted from the endowment on the vicar. It is said, that the whole tithes arising from the farm belong to the impropriator, who may be the lessor of the defendant, or some other person. This is but a different way of putting the same question. If the farm now called *Alswick* were the demesne of the manor, the vicar was not endowed of any tithes arising from it, and, as a necessary consequence, they remained in the impropriator, conjoined to the impropriation, and the grants

of the rectory would pass them to the person to whom the rectory was granted. It is manifest that the same fact, *viz.* these being the demesnes of the prior, is as essential to shew that the tithes remained in the rector at the moment of the endowment, as it is to shew, that they did not pass to the vicar. It is, in truth, the same question, and the defendant failing in one, fails for the same cause in the other.

I think, therefore, that the plaintiff is entitled to the account and payment prayed by his bill, that is, to an account of all small tithes arising from the farm since the 29th of *October*, 1823, and to payment of what shall appear to be due on that account.

I see nothing in the case to protect the defendant from the usual consequence of a decree against him, the costs. The decree must go with costs.

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HENRY WATSON, by his will, dated 22nd *August*, 1767, after certain specific bequests, gave and bequeathed unto *Sarah Goodchild* the interest money of 1000*l.*, which he had in the 3*l. per cent.* Consolidated Annuities in the Bank of *England*, for and during her natural life; and he directed his executrix, immediately after his decease, to take out of the hands of *Francis Hall*, of *Nottingham*, the 200*l.* principal, which he lent him, with all the interest due thereon, and with the same sum to purchase annuities in the Bank; and the interest monies which this should produce, he gave likewise to her for her natural life; and after the decease of the said *Sarah Goodchild*, he gave and bequeathed the 1000*l.* in the annuities to *Robert Hall*, *Henry Watson Hall*, and *Mary Hall*, three

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June 16th.

Under a bequest of stock to *A.* for life, and after the decease of *A.*, to the testator's great grand-children, share and share alike, if they were living at the time of *A.*'s death, but, that they should not receive any part of the capital till they arrived at twenty-one. But, if any one, or all of the said children should die before they arrived at the age of twenty-one years, the shares or part of

those so dying should go to *B.* and *C.*, share and share alike: *Held*, that the attaining twenty-one was not confined to the event of surviving *A.*, and, therefore, that on the decease of one of the children in the life-time of *A.* under twenty-one, the share of such child passed to *B.* and *C.*, and did not lapse so as to go to the testator's residuary legatee.

Executor charged with interest on dividends of stock received by him, and kept at his banker's with his own money for a number of years, instead of being invested to accumulate.

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of the children of his grandson, *Henry Watson Hall*, share and share alike, if they were living at the time of *Sarah Goodchild's* decease; but his will was, that they should not receive any part of the said 1000*l.* till arrived at the age of twenty-one, but that the interest money which that should produce, should be laid out on the three children by *Frederick Amelia Palman*, whom he constituted and appointed trustee for them; but, if any one, or all of the said children should die before they arrived at the age of twenty-one years, the share or part of those so dying he gave and bequeathed to *Thomas Goodchild* and *Frederick Amelia Palman*, share and share alike; and after the decease of *Sarah Goodchild*, he gave unto her son, *Thomas Goodchild*, if living at the time, the annuities purchased by his mother with the money she received from *Francis Hall*; but, if dead, then he gave it to *George Lewis Palman*; and he constituted and appointed *Sarah Goodchild* sole executrix of that his will; and all the rest of his goods, chattels, and estates whatsoever and wheresoever he might have, or be entitled to, at the time of his decease, he gave, devised, and bequeathed to *Sarah Goodchild* for ever.

The testator died in 1771; and his will was proved by *Sarah Goodchild*.

The testator, at the time of his death, was possessed of the funds mentioned in his will, and which remained after payment of his debts; and the interest of such funds was received by *Sarah Goodchild* during her life-time.

Sarah Goodchild died in *December*, 1787, having made a will, by which she bequeathed her personal estate and effects to the plaintiff, and appointed certain executors, of whom the defendant *Fenton* was the survivor, who proved her will, and possessed her personal estate, and also the estate bequeathed by the testator.

Henry Watson Hall and *Mary Hall* survived *Sarah Goodchild*, and each of them received one-third part of the 1000*l.* stock, but *Robert Hall* died an infant in the life-time of *Sarah Goodchild*.

The bill was filed by the plaintiff as the residuary legatee of *Sarah Goodchild*, and also as the administrator of *Thomas Goodchild*, the husband of *Sarah Goodchild*, and who died in her life-time, against the defendant *Fenton* as the surviving executor of *Sarah Goodchild*, and *Mary Palman*, as executrix of *Frederick Amelia Palman*, claiming the whole one-third of *Robert Hall* by lapse, as the residuary legatee of *Sarah Goodchild*, or one moiety of it, as the administrator of *Thomas Goodchild*.

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The defendant, *Fenton*, by his answer submitted the point to the Court, and stated that the one-third of the stock was still standing in the name of the testator, *Henry Watson*; and that since the death of *Sarah Goodchild* he had received the dividends thereof, and had from time to time paid the same, with other monies, into the hands of his bankers, and that the same had not been invested in the purchase of any other stock.

The defendant, *Margaret Palman*, the administratrix of *Frederick Amelia Palman*, claimed a moiety of the fund.

In *February*, 1804, *Fenton*, pursuant to an order, transferred the fund into Court.

By the decree made on the hearing of the cause, dated 7th *May*, 1804, it was referred to the Deputy Remembrancer to inquire whether *Robert Hall* was dead, and if dead, when he died, and whether he had attained twenty-one.

Some difficulty arising in proving the death of *Robert Hall*, no proceedings were had in the cause for upwards of twenty years; during which time, *Fenton* not only neglected to and accumulate the dividends, but the stock was actually transferred to the commissioners for the reduction of the national debt, as unclaimed.

In 1829, the plaintiff having discovered evidence of *Robert Hall's* death, the Master made his report, dated the 29th *May*, 1829, by which he certified, that *Robert*

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Hall, in 1775, enlisted as a recruit in the *East India* Company's service, and died on board a vessel called the *Sophia*, on her passage from *Madras* to *Fort William*, on the 12th *April*, 1776; and that he had not then attained twenty-one.

The suit having become abated by the death of *Mary Palman*, a supplemental bill was filed, by which the defendant *Findlay*, the administrator *de bonis non* to *Frederick Amelia Palman*, was brought before the Court.

The cause now came on to be heard for further directions, and on a petition that the commissioners for the reduction of the national debt might restore the fund.

Mr. *Knight*, and Mr. *Flather*, for the plaintiff, contended, that by the death of *Robert Hall* in the life-time of *Sarah Goodchild*, the bequest to him lapsed, and passed as part of the residuary estate of *Sarah Goodchild* to the plaintiff.

Mr. *Jervis*, and Mr. *Ward*, for the defendant, *Findlay*, the representative of *Frederick Amelia Palman*, claimed a moiety of the fund.

Both claimants insisted, that, as the defendant *Fenton* had continued to receive the dividends from 1787 to 1804, and had kept them at his banker's, he ought to be charged with interest on these dividends. It was also contended that he ought to be charged with the loss sustained by his subsequent neglect, and to be visited with costs. And *Treves v. Townsend* (a), and *Ex parte Townsend* (b), were cited.

Mr. *Treslove*, for the defendant *Fenton*.

Mr. *Wray*, for the commissioners for the reduction of the national debt.

(a) 1 Cox, 50.

(b) 15 Ves. 470.

LORD CHIEF BARON.—I can find no distinct intention expressed by the testator, if any such he had. The safer course, therefore, in this case will be, to adhere to the legal sense of the words. The gift is to *Sarah Goodchild* for life; and after her decease, to three of the children of the testator's grandson, *Henry Watson Hall*, share and share alike, if they were living at the time of *Sarah Goodchild's* decease; and the testator's will was, that they should not receive any part of the principal till they attained twenty-one. He then proceeds, but if any one or all of the said children should die before they arrive at the age of twenty-one years, the shares or part of the deceased, he gives to *Thomas Goodchild* and *Frederick Amelia Palman*, share and share alike. The natural effect of this would be, to give the three children of *Henry Watson Hall* vested interests in the stock, on their respectively attaining twenty-one; but in case of the death of any or either of them under twenty-one, the shares of them so dying would go to *Thomas Goodchild* and *Frederick Amelia Palman*. And, according to this construction, it would only be necessary to inquire when they died, with a view of ascertaining whether any of them died under twenty-one. But it is desired to introduce another term, *viz.* "surviving *Sarah Goodchild*." The argument is, that the words "surviving *Sarah Goodchild*," ought to be introduced. I will not say that such may not have been the testator's intention, but I do not see it distinctly. I must declare the representatives of *Thomas Goodchild* and *Frederick Amelia Palman* to be entitled to the share of *Robert Hall*, on his dying under the age of twenty-one years. The defendant *Fenton* must pay interest on the dividends received by him until the fund was transferred into Court. I cannot find any principle on which to charge him with interest subsequently to the institution of the suit. *Fenton* must also pay the costs occasioned by his misconduct.

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A. having purchased a freehold estate and paid part of the purchase-money, died intestate, leaving two daughters, his co-heiresses and next of kin. After his decease, on payment of the remainder of the purchase-money by the two daughters and their husbands, the estate was conveyed to the two daughters as tenants in common. By an arrangement between the two daughters and their husbands, the freehold estate, and certain personal property, were agreed to be taken by B., the husband of one of the daughters, (by whom the remainder of the purchase-money for the estate was recited, to have been paid), as his share of the property, and a fine was covenanted to be levied to the use of B. in fee. The fine was neglected to be levied, but B. remained in possession till his death, acting as absolute owner of the estate: shortly before his death, and seventeen years after the covenant to levy the fine, a deed was executed and fine levied, by which the estate was settled to the use of B. and his wife for their lives successively, with remainder to their children. A bill by the creditors of B. to set aside this settlement as voluntary and fraudulent within the statute 13 Eliz. c. 5, was dismissed.

Where a fine is covenanted to be levied to certain uses, it is competent to the parties, whilst it is directory, to vary the uses, but the uses must be varied by all the parties, and by an instrument of as high a degree as the former, and the fine ought to be levied to the same conusee; and, therefore, where a fine covenanted to be levied to certain uses was omitted to be levied, and several years afterwards a fine was levied by the same conusors pursuant to a deed declaring other uses, and to a different conusee—*Held*, that the fine operated to the uses of the latter deed, and not of the former.

SOME time prior to the year 1799, *Henry Wildey* agreed in writing to purchase from one *William Bramwell* a house in *Greek-street, Soho-square*, called *Old Portland House*, for the sum of 2500*l.*, of which 500*l.* was paid at or about the time of signing the agreement, and *Wildey* was let into possession.

Shortly afterwards, in *October*, 1799, *Wildey* died intestate, without having completed his purchase, leaving a widow and the defendant, *Margaret Tate*, then the wife of *William Tate*, (since deceased), and *Elisabeth Kirby*, the wife of *Samuel Kirby*, his two daughters and co-heiresses.

The widow obtained letters of administration.

By an indenture, dated 27th of *August*, 1802, *Wildey's* widow assigned to *Tate* and his wife, and to *Kirby* and his wife, certain leasehold estates therein described, and all other the personal estate of *Wildey*; in consideration of which assignment, *Tate* and *Kirby* secured to her by their bond an annuity for her life of 80*l. per annum*, and covenanted to pay all *Wildey's* mortgages, and, in general terms, to satisfy all his engagements.

By articles of agreement dated 11th of *April*, 1805, between *William Tate*, of the one part; and *Samuel Kirby*,

of the other part; *Kirby* covenanted to release, convey, assign, and assure to *Tate* the premises called *Old Portland House*, and also certain fixtures, book-debts, and stock therein mentioned; and *Tate* agreed to accept the same for his share of *Willey's* estate, and also to pay and discharge all principal money and interest due on the said premises, and also to assign to *Kirby* certain leasehold premises, the property of *Willey*, and which *Kirby* agreed to take as his share of *Willey's* estate. By indentures of lease and release, dated 2nd and 3rd of *April*, 1806, *Bramwell*, the vendor of *Old Portland House*, and *Thomas Parker*, his trustee, in consideration of the 500*l.* paid by *Willey*, and in consideration of 2615*l.*, the residue of the purchase-money, with interest paid to *Bramwell* by *Kirby* and *Elizabeth* his wife, and *Tate* and his wife, conveyed the freehold premises called *Old Portland House* to *Elizabeth Kirby* and *Margaret Tate* as tenants in common, their respective heirs and assigns, for ever.

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indenture of assignment of the same date, *Kirby*, for himself and his wife, and their respective heirs; and *Tate*, for himself and his wife, and their respective heirs, covenanted with *George Green* in or as of *Easter Term* then next ensuing, or in or as of some subsequent term, to levy one or more fine or fines *sur conuxance de droit come ceo, &c.*, with proclamations, unto the said *George Green* and his heirs of the said messuage, called *Portland House*, which fine, it was declared, should operate and enure to the use of *William Tate*, his heirs and assigns, for ever.

Some steps were taken towards levying this fine; but it was admitted on all hands that the fine was not perfected. *Tate*, however, continued in the possession of *Old Portland House* until his death, in the year 1825.

By an indenture, dated 25th *March*, 1823, indorsed on the indenture or deed of covenant of 5th *April*, 1805, and made between *Kirby* and his wife, of the first part; *Tate* and his wife, of the second part; and *John Parker Gylby*, of the third part; for the nominal consideration therein mentioned, *Kirby*, for himself and his wife, and *Tate*, for himself and his wife, covenanted with *Gylby*, as of *Easter Term* then next ensuing, or some subsequent term, to levy a fine *sur conuxance de droit come ceo, &c.* to *Gylby* and his heirs, of the said freehold house, called *Old Portland House*; which fine, it was declared, should enure to such uses, &c. as *Tate* and his wife should, in manner therein mentioned, jointly appoint. In default of appointment, to the use of *Tate* for life, with remainder to the use of the defendant, *Margaret Tate*, for life; with remainder to the children of *Tate*, and his wife, (who were defendants to the bill), as tenants in common in fee. In *Easter Term*, 1823, the fine covenanted to be levied by this indenture was levied.

Tate died in the year 1825 intestate; and administration to his estate was obtained by the plaintiffs, *Richard Curl* and *Philip Upstone*, as judgment creditors.

The bill was filed by *Sarah Houghton* as the representative of the Rev. *John Houghton*, who was a creditor of *Tate* for 500*l.* on a bond, dated in the year 1805; and by *Curl* and *Upstone*, as creditors for 800*l.*, in respect of a judgment obtained by them against *Tate* in the year 1809; against *Margaret Tate* and her children, and against the personal representatives of *William Marston Hall*, to whom the premises had been jointly appointed by *Tate* and his wife in fee, by way of mortgage, for securing 2000*l.* and interest, with a power of sale, under which power the property had been sold to *James Wilson*, (who was another defendant to the bill), for 8000*l.*

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The object of the suit was, to have the limitations contained in the indenture of the 25th May, 1823, in favour of the defendants *Margaret Tate* and her children, declared fraudulent and void as against the plaintiffs and the other creditors of *William Tate*, on the ground, that it was a voluntary settlement by him when in a state of insolvency; and to have the money produced by the sale of the property, after satisfying the mortgage debt to *Hall's* representatives, applied in liquidation of the debts due to the plaintiffs and the other creditors.

The bill, among other things, charged, that the debt to *Houghton* was contracted by *Tate* expressly for the purpose of enabling him to pay off *Willey's* debts, and on the faith that *Tate* was the absolute owner of *Great Portland House*.

Mr. *Treslove*, and Mr. *Simpkinson*, for the plaintiffs.—*Willey's* estate being insufficient for payment of his debts and the residue of the purchase-money, *Tate* paid the difference out of his own money; and, in equity, had a lien on the estate at least to the extent of the money paid by him. *Pitt v. Pitt* (a). That the whole of the money was paid by *Tate* is clear, from the recital in the deed of covenant

(a) 1 Turn. 180.

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in 1806. The fine covenanted by that deed to be levied may, in equity, be treated as having been levied. It has been held in several cases, that a husband will be compelled to procure his wife to join in a fine according to his covenant. In *Hall v. Hardy* (a), Sir *Joseph Jekyll*, then Master of the Rolls, says, "There have been a hundred precedents, where, if the husband for a valuable consideration covenants that his wife shall join with him in a fine, the Court has decreed the husband to do it, for, that he has undertaken it, and must lie by it, if he does not perform it." *Barrington v. Horn* (b), *Daniel v. Adams* (c). In *Morris v. Stephenson* (d), a husband was decreed to procure his wife to join in a surrender of a copyhold estate. The only thing which can be opposed to these cases, is the *dictum* of Lord *Eldon* in *Emery v. Wase* (e). But, presuming that the husband could not have been compelled to procure his wife to join in levying the fine; still, the fine levied in 1823 would operate to the uses declared by the deed of 1806, in preference to the uses declared by the settlement of 1823. *Stapilton v. Stapilton* (f). *Tate* being proved to have been in insolvent circumstances at the date of the settlement, that instrument was clearly void as against the plaintiffs, who are entitled, at all events, to the interest, be it what it may, which *Tate* took in the property.

Mr. *Boteler*, and Mr. *Haldane*, for *Margaret Tate* and several of her children.—The fine levied in 1823 did not operate to the uses declared by the deed of 1806, but to the uses of the settlement of 1823. It is true that the parties might alter the old uses and declare new, but then it must be done by mutual consent of all the parties. Countess of *Rutland's* case (g). This

(a) 3 P. Will. 187.

(b) 5 Vin. Ab. 547, pl. 35.

(c) Amb. 495.

(d) 7 Ves. 474.

(e) 5 Ves. 846; 8 Ves. 505.

(f) 1 Atk. 2.

(g) 5 Co. 25 b.

principle is also stated in *Moore*, 107. All the arrangements between the parties shew that *Wilkey*, instead of being insolvent, left very considerable property, and much more than sufficient to pay *Bramwell's* purchase-money. Admitting, however, that *Tate* paid the purchase-money, and had a lien for it, still that lien has been satisfied by the money received by him from the mortgage. *Pitt v. Pitt* has no application, for there the wife herself sought to confirm the lien. It may also be doubted whether a purchase in the name of a wife and children is within the statute (a), which would only appear to apply to a settlement of property already possessed by the settlor. *Lady Gorge's* case (b). *Fletcher v. Sedley* (c). *Procter v. Warner* (d). *Glaister v. Hewer* (e). *Ridler v. Punter* (f). *Campion v. Cotton* (g). *Burrough's* case (h); and *Sugden's Law of Vendors and Purchasers*, 6th edit. 627, 640. The settlement in this case was not a voluntary settlement, the property originally belonging to the wife. *Scot v. Bell* (i).

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Mr. *Merivale*, for one of the children of *Margaret Tate*, in addition to the arguments for the other children, urged that the case made by the bill with respect to *Tate's* insolvency was not satisfactorily established by the evidence.

Mr. *Treslove*, in reply.—The question is, whether the settlement of *March*, 1823, is not a deed between the same parties as the deed of 1806, that is, with respect to the parties concerned in interest. They could not clearly declare new uses without *Tate*, and *Tate's* interest was bound by the statute. In *Fletcher v. Sedley* there is no judgment pronounced by the Court, but only a statement

(a) Stat. 13 Eliz. c. 5.

(e) 8 Ves. 195.

(b) Cited in *Crisp v. Pratt*, Cro. Car. 550.

(f) Cro. Eliz. 291.

(c) 2 Vern. 490.

(g) 17 Ves. 263.

(d) Sel. Cases in Ch. 78.

(h) Cited in *Campion v. Cotton*.

(i) 2 Levinz, 70.

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of the inclination of the Judges. In that case it did not appear that the settlor was indebted, which is a principal ingredient in the case; and it was argued that the lease could not be assets because Sir *Charles Arrington* never had the term in himself. *Procter v. Warner* is reported in a book of very little authority, has no application, and is not a decision, but a mere *dictum*. In the present case, there is no contract for a settlement. In *Glais-ter v. Hewer*, Sir *William Grant* founded his opinion on the very peculiar words used in the statute, which was the bankrupt act (a), and not the statute now in question. Lord *Eldon* was of opinion that the case came within the statute of *James*, observing, that the principal doubt he had, was upon that part of the case in which the Master of the Rolls had been of opinion that even a purchase with the money of the husband was not causing or procuring the conveyance within the statute of *James*. Lord *Eldon*, however, thought that what was bought with the husband's money was, within the meaning of that statute, bought for the creditors.

Dec. 15th.

LORD CHIEF BARON.—The plaintiffs in this suit are bond and judgment creditors of one *William Tate*. The object of the suit is, to obtain payment of their debts out of a certain freehold messuage and premises, or rather the price of it, for it has been sold, comprised in an indenture dated in *March*, 1823, which the creditors allege was a fraudulent settlement, because it was a voluntary settlement on the debtor's wife and children. The bill prays all the formal relief necessary to effectuate this equity, and that the plaintiffs may be paid their debts out of the produce of this estate.

I need not suggest, that the relief sought is founded on the statute 13 *Eliz.* c. 5, and the equity which that statute was made to secure and enforce.

(a) 1 Jac. 1, c. 15.

The defendants most interested in the questions which have been discussed, are the wife and children of the debtor claiming under the supposed voluntary and fraudulent deed. The case is attended with some peculiar circumstances, which it will be necessary to state.

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[*His Lordship stated the transactions at length*]. Some argument in favour of the plaintiff's case has been founded on the supposed fact, that the 2615*l.*, though represented in the conveyance from *Bramwell* to have been paid by *Tate* and his wife, and *Kirby* and his wife, was in truth paid by *Tate* alone, out of his own proper resources. I do not know that this is a material fact; but if it were, I do not find it established by any thing like evidence, and it is contrary to every probability. What remained due from *Willey*, as the price of this estate, was his personal debt; and those on whom the real estate devolved, were entitled to have the purchase completed out of his personal estate, if he had any. *Tate* and *Kirby* possessed that personal estate, whatever it was; for the administratrix assigned it to them. If it were true, as suggested, that *Tate* had really paid for this estate, it seems difficult to conceive for what reason he did not state this fact upon the conveyance, and why a security was not made to him; but instead of this, he acknowledges under his hand and seal, the money to have been paid by himself and *Kirby*, and their two wives, and the estate was conveyed to the two wives, the daughters and co-heirs of *Willey*, as tenants in common in fee. All this was strictly proper if *Willey's* debt were paid out of *Willey's* assets, but is totally unintelligible if the debt, that is nearly the whole price of the estate, were in truth paid by *Tate*.

I am desired to infer from the agreement in *April*, 1805, that *Tate* did in fact discharge the principal and interest out of his own proper monies. This is not a necessary inference. *Willey* carried on a trade, I believe

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that of a coachmaker, upon these premises; and it was part of the same stipulation, and provided by the same instrument, that *Tate* should, besides the freehold, have *Wildey's* stock in trade and his book debts. Such possibilities are sufficient for the present purpose. There is, on the other side, nothing but loose inferences. The deed of conveyance itself, to which both *Tate* and *Kirby* are parties, expressly states it otherwise, and the conveyance is made to the two co-heirs in accordance with such statement, and is inconsistent with the hypothesis that the money was advanced by *Tate* out of his own funds. The recital in the deed of covenant of the 5th of *April*, 1806, that no part of the sum of 2615*l.* represented in the conveyance from *Bramwell* as paid by *Kirby* and his wife, and *Tate* and his wife, was paid by *Kirby* and his wife, or either of them, but was the proper money of *Tate* and *Margaret* his wife, rather confirms than contradicts the position that this money was paid chiefly out of *Wildey's* assets, and not by *Tate*, from his private means. Why introduce the name of *Margaret Tate*? So far as she could be considered as advancing any part of the money, it could only be by the application of *Wildey's* assets in satisfaction of his debts.

It is an acknowledged fact that the fine covenanted to be levied by this deed, was never levied. It was, therefore, so far as respected the two married women and their freehold, a void deed and without operation.

There is some evidence in respect of measures taken to levy such fine. A witness, an attorney, I believe, for the plaintiffs, says, that it appears, by the papers of a deceased attorney, that the fine was acknowledged by the married women before commissioners. This is no evidence; even the papers themselves probably would not be evidence, but the subject is not worth inquiring into. That the fine was never completed is agreed on all sides. There was no fine at that time to confirm the transaction.

However, *William Tate* remained in possession to the end of his life, that is, to the year 1825. He was entitled to this possession with or without the fine. As both *Tate* and *Kirby* lived to that time, their marital rights apparently gave them the possession of both moieties; and, with the consent of *Kirby*, *Tate* was entitled to the possession of the whole. While in this situation, the indenture of the 26th of *March*, 1823, is executed.

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It is evident that the plaintiffs must go a step further than to set aside this deed. Their object is to charge the land by making it the fee of *William Tate*, their debtor. If it remained the estate of the married women upon whom the moieties descended as co-heirs of *Willey*, the purchaser, and to whom the legal estate in fee was conveyed by *Bramwell*, the vendor in the deeds of *April*, 1806, then *William Tate's* interest in it, which was the marital right only, ceased with his life, and upon his death it became the estate of the defendant, his widow, as a *feme sole*. This result would be quite as fatal to the claim of the plaintiffs as sustaining the settlement of *March*, 1823.

The plaintiffs were fully aware of these consequences, and therefore they contended that the indenture of the 5th *April*, 1826, which purported to give the fee of both moieties to *William Tate*, and which for so many years remained inoperative for want of a fine, was confirmed and established by the fine of *Easter Term*, 1823, levied seventeen years afterwards, in pursuance of a different covenant, and to a different conusee.

They further proceeded to insist that *Tate* was the real purchaser of this estate by paying the greater part of the price, and therefore that it ought in equity to be

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considered as his estate, at least in the proportion by which he discharged the purchase-money.

There was also, in the argument, an allusion made to the character of *Tate* as a trader, and to the statute which charges his debts upon his estate. As this view of the controversy supposes that the premises were the estate of *William Tate*, the debtor, it is obvious that it begs the question. If the plaintiffs succeed upon the other points, they have no occasion for this point; if they fail in the other points, this must fall with them.

The first, therefore, and a material question, is, whether the fine of *March*, 1823, had the effect of settling the estate to the uses of the deed of 5th *April*, 1806. Before I proceed to examine this point more in detail, I will state that I do not doubt that the plaintiffs are creditors of *William Tate*, so as to entitle them to sustain the suit, if it can be sustained in other respects. Did then the fine of 1823 bind the estate to the uses of the deed of 5th *April*, 1806? I can find no principle or authority for what the plaintiffs contended on this point. The earliest case cited upon this subject is that of the Countess of *Rutland* (a). From the facts of that case itself little is to be inferred, except, that there being two deeds, both before the fines, which were in some respects inconsistent with each other, the last revoked the first. But, after the manner of that age, the Court resolved various points: 1st, That where the fine was levied according to the indentures, so as to be strictly a performance of the covenant; there the law would not permit an averment of a new agreement of an inferior character mesne between the indentures and the fine to lead the uses of the fine. But if the new agreement were of as high a character as the first, then, as being the last, it should prevail, and the fine should enure to its uses. 2nd, That if the fine did

(a) 5 Coke 25 b.

not pursue the indentures, in that case an averment of a new agreement by parol to rule the uses of the fine might be received. The obvious ground of this distinction is, that, in the first case, where the fine and deed fitted each other exactly, it would have been contradicting the deed to apply the fine to any other uses than those expressed in the deed. But in the last case, where the fine was not the one described in the deed, it was no contradiction to the deed to apply such fine to any other contract or agreement.

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There is a third resolution also explanatory of the law upon this subject, *viz.* that where the fine is not levied exactly according to the covenant, so that any new agreement might have been shewn, the law will apply the fine to the indentures. This is evidently only a presumption of fact that the parties so intended, the contrary not being shewn. This case was in 1604.

In 1698, nearly a century afterwards, the same principles are stated and acted upon by Lord *Holt* and the Court of *King's Bench*, in the case of *Jones v. Morley*, reported in 2 *Salkeld*, 677, and more fully in 1 *Lord Raymond*, 287. Lord *Holt* stated the rules exactly as they are stated by Lord *Coke*, and referred to the case. The substance of *Jones* and *Morley* is, that *Morley* and his wife, by deed dated the 24th of *January*, 1665, covenanted to levy a fine as of *Hilary* Term next following, which was to be to the use of *Morley* and his heirs. It is to be observed, the 24th of *January*, 1665, is in *Hilary* Term, 1665, and therefore *Hilary* Term next following mentioned in the covenant must have meant *Hilary* Term, 1666. Before any fine was levied, and on the 31st of *January*, 1665, a writing, indented, but not sealed, was made between *Morley*, of the one part, and his wife, of the other; by which it was agreed, that the uses declared by the deed of the 24th of *January* should be revoked, and that all former agree-

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ments should (except upon contingencies which never happened) enure to the use of the wife and her heirs. On the last return of the same *Hilary* Term the fine was levied. The question which arose was, whether the fine should operate to the use of the deed of the 24th of *January*, 1665, to the husband and his heirs, or to the use of the subsequent unsealed agreement of the 31st of the same *January*, 1665, to the wife and her heirs. Lord *Holt* and the Court of *King's Bench* were of opinion, upon the principles before stated, that the fine, not having pursued the deed, it being levied in *Hilary* Term, 1665, and not in *Hilary* Term, 1666, it was competent to shew a new agreement. That the indenture of the 31st of *January*, though not sealed, was such agreement, and the agreement in pursuance of which the fine was levied. It was therefore held, that the fine actually levied should enure to the uses of the agreement of the 31st *January*, 1665, made between the husband and wife only.

These are great authorities, and have not to my knowledge ever been impugned. Wherever the subject has been mentioned, the principles which these cases establish have been approved and acknowledged. If applied to the circumstances of the present case, they leave no doubt as to the result. The deed of the 5th *April*, 1806, provides that the fine shall be levied of *Michaelmas* Term then next ensuing, or of some subsequent term, and the conusance is to be made to *George Green*. The fine actually levied is levied seventeen years afterwards, as of *Easter* Term, 1823, and the conusance is made to *Gylby*. Without noticing the distance of time, the change of the conusee is a sufficient variance between the covenant and the deed of 1806, and the fine in 1823, to let in, according to these cases, any legal evidence of a new agreement, even if the second agreement were not of so high a character as the first. But, it is not necessary to resort to this circumstance. The second is

like the first, under seal, and would, therefore, according to the authorities, have rescinded the first, and have led the uses of the fine, even if there had been no variance between the covenant in the first deed and the fine.

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It was urged in the discussion, that, in all the cases, the original contract was rescinded by all the parties to it; and it was said, that this was not so rescinded. But in fact it was so rescinded, and by the same parties. *Tate's* debts are, I presume, supposed to make a difference. In order to contradict this argument, the case of *Stapilton v. Stapilton* (a) was cited. The circumstances were these:—*Philip Stapilton*, the father, was tenant for ninety-nine years, if he should so long live. There were trustees to support contingent remainders; and then a limitation to his first and other sons in tail. He had two sons; the eldest, *Henry*, the youngest, *Philip*. They were both born of the same mother; but the eldest, though it was not then openly declared, was born before the marriage. It was the evident intention of the parties to prevent the question respecting the legitimacy of the eldest son arising; and, therefore, by lease and release, dated 9th and 10th *September*, 1724, the sons being both adult, they joined in conveying the estate to *Thomson* and *Fairfax*, to make them tenants to the *præcipe*, to suffer a recovery, and the uses divided the estate, so that *Henry*, whose legitimacy was doubted, took an estate for life in a part with remainder to his sons in tail, and the rest of the estate was allotted in separate divisions to the father and the second son, *Philip*. There was a covenant to suffer a recovery within twelve months. Before the recovery was suffered, *Henry*, the eldest, and whose condition was doubtful, died, leaving a son and heir. After his death, and before the twelve months had expired, new deeds, dated in *April*, 1725, were executed between the father and the surviving

(a) 1 Atk. 7.

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son, in which the entire estate was limited to them, and no notice whatever taken of *Henry*, or his son. A recovery was then suffered within twelve months, which agreed in all respects with the original deed, except that *Henry*, being dead, was not vouched. Lord *Hardwicke* supported the first deed, and relieved the son of *Henry*; being of opinion, that the first deed contained a contract for a valuable consideration, as being a compromise of doubtful rights; and that it was not competent to the other parties, in the absence of *Henry*, to rescind that contract, and take the whole estate to themselves; a decision, of which the justice cannot be doubted. But that case and the present are entirely dissimilar. In that case, the recovery was suffered precisely according to the covenant in the first deed, except as to one circumstance which had become impossible. The recovery was suffered within the time limited by the deed; and the tenants to the *præcipe* were the persons mentioned in the covenant. Whoever will carefully examine that case, will feel that the decision rests upon what Lord *Hardwicke* himself states in his judgment, *viz.* that the first deeds, the deeds of 1724, constituted a contract for a valuable consideration, which the son and heir of one of the parties, on whom his rights devolved, was entitled to have specifically performed. In truth, that is the substance of his decree. I have had recourse to the Register's book for the order. It does not contain any declaration whatever that the recovery should enure to the uses of the deeds of 1724; nor is there, I believe, any mention of the recovery at all, but there is a declaration, that the son of *Henry* was entitled to the lands limited in remainder to him as the first son of *Henry*, his father, by the deed of 1724, and that he was entitled to the benefit of the covenants contained in those deeds. There is then a decree for mutual conveyances, according to the uses of those deeds. And, as the plaintiff, the son of *Henry*, was an infant, his Lordship ordered

that the other two persons should hold and enjoy the lands settled upon them during his infancy, and that, when he came of age, he should convey the proportions of the estate according to his father's contract. All the other directions contained in the decree proceed upon the same principle. The decree is nothing but a specific performance of the contract contained in the deeds of 1724, made for a valuable consideration between competent parties, and which the recovery enabled the surviving parties to fulfil.

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In the present case, if I were to hold, that the fine levied to *Gylby* in 1823, would operate legally to the uses of a covenant entered into in 1806, which stipulated for a fine to *George Green*, when there was an intermediate agreement, it would be to contradict every authority upon the subject. The fine agrees in every thing with the deeds of 1823, and in nothing with the deed of 1806.

However, this does not decide the question. I must proceed to inquire whether the contract, as it is called, contained in the deed of 1806, can give to the plaintiffs any equitable title to a specific performance of that contract, so as to make this estate in equity the fee-simple of *William Tate*, their debtor. If they could do so, they would stand nearly in the same situation as the plaintiff, the son of *Henry*, did in *Stapilton and Stapilton*.

Before I approach this subject more closely, I premise, that I think myself bound to treat the question without any regard to the steps supposed to have been taken in 1806 towards levying a fine at that period. It is agreed, that no such fine was ever levied, and upon that hypothesis I must proceed.

The deed of 1806 was constructed for the purpose of giving the estate now in question to *William Tate* in fee. The estate belonged to the two wives. The husbands had nothing but their marital rights. The deed, so far as respected the married women, was merely void, till confirm-

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ed by a fine according with it. If no fine had ever been levied, what remedy, after *Tate's* death, could his creditors have had upon that deed? Could they have compelled these two women, or either of them, to join in a fine? What relief could they have had under the head of specific performance of this contract? Mrs. *Tate's* share would have become vested in her, Mrs. *Kirby's* in like manner in her. This view of the situation of the estate in the event of *Tate's* death, before any fine was levied, illustrates the nature and effect of this agreement of the 5th *April*, 1806, standing by itself alone, and operating only by its own proper force, obviously entirely different from the original contract in *Stapilton v. Stapilton*, which bound every part and the whole estate.

It is placing the plaintiffs in a very favourable situation to treat them as purchasers from *William Tate*. If their claim in this cause be put upon their having, as such purchasers, a right to the estate, it is quite manifest, that at no time could they have had any such right. They might, if the rule of equity had remained, as perhaps it once was, which is more than doubtful, have obtained a decree against *Tate* to procure a fine and a conveyance; but such a decree could have given them no interest in the estate itself. The married women were fully entitled to refuse to levy the fine, and might have done so; and if, by any change of circumstances, the plaintiffs lost the lever by which they acted, I mean the power over *Tate*, there was, at once, an end to their rights and remedies together.

In *Stapilton v. Stapilton*, *Henry*, the deceased son, had a clear equitable interest in the land, as much as any purchaser has who buys for a valuable consideration from the acknowledged owners. In the present case, the supposed purchaser obtained by the deed no interest whatever from any acknowledged owner. The owners were the two married women; and there could be no valid contract respecting their estate till their consent was for-

mally, legally, and freely given, in other words, till it was confirmed by a fine. But this event never happened. It seems to me to be clear, therefore, that the deed of 5th *April*, 1806, could not give to any person claiming under *Tate*, any title to enforce a conveyance of this estate.

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These difficulties upon the plaintiffs increase, when the subsequent deed of *March*, 1823, and the fine, are taken into consideration. If it were conceded that these plaintiffs, as creditors of *Tate*, might have the benefit of the statute of the 13 *Elix.* upon a proper case, they have further to make out, that the deed of *March*, 1823, and the fine levied in pursuance of it, was a voluntary conveyance, a pure gift from *William Tate* to his wife and children. But that is far from being the truth. *Tate* had nothing but his marital rights, and, it may be, those of *Kirby*. The owners, the chief donors, the settlors, were the two women. The defendants claim from them, not from *Tate*; and it is a fallacy to treat this settlement as a settlement made by *Tate* upon his wife and children.

The result is, that, in my opinion, the plaintiffs are entitled to no relief upon this bill, unless they could establish, either, that the fine of 1823 enured to the uses of the deed of *April*, 1806, or, that the last-mentioned instrument contained a contract between such parties, and for such considerations, as would entitle them to a specific performance of it. They fail in both. The fine of 1823 did not enure to the uses of the deed of 1826, because it did not accord with it in any respect, and because it was actually levied in pursuance of a new and subsequent agreement, which it strictly pursued, and with which it accorded in every circumstance. They cannot have a specific performance of the deed of 1806, because it is a void instrument as far as respects the material parties, those who had the chief interest in the estate, the married women. I need hardly add, that the deed of *March*, 1823, is not a voluntary settlement by which the estate moved from

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William Tate, the debtor; I view it more as a settlement made by the two married women.

In arriving at this conclusion, I have not availed myself of the point suggested and argued on the part of the defendants, *viz.* that the statutes of *Eliz.*, the 13th and 27th, do not affect land which is purchased by the debtor, and where the land is conveyed directly by the vendor to the family of the debtor. I have not thought it necessary to examine it, being satisfied upon the ground I have stated at so much length. I, therefore, give no opinion upon it.

There is another view of the case to which I have already alluded, and which is not permitted to me to pass by without more notice. It is the allegation, that the estate in question was chiefly the estate of *William Tate*, in consequence of his having paid the chief part of the purchase-money to *Bramwell*, the vendor. I cannot adopt this view of the question, because, I am satisfied that it is not true in fact, and that, if it were true, the money has been refunded to him.

I have already stated that the averment is contrary to all probability:—that *Tate* possessed *Wildey's* stock in trade and book debts:—and that, in the conveyance by the vendor *Bramwell* to the daughters, the money is represented as paid by *Tate* and his wife, and by *Kirby* and his wife. I can find upon this record no evidence whatever to support the assertion made by the plaintiffs, except that of Mr. *Gill*, who I take to be the plaintiffs' attorney, who knows nothing of it himself, but infers it, as he says, from the deed of *April*, 1806, containing the covenant to levy a fine. A meagre case to establish such a proposition. But, I think he has mistaken the deed. I have not been furnished with a copy of it; but, upon the pleadings, it is stated differently. If I am to rely for its contents upon the statement in the answers, the recital in that deed was, that the money was not paid by *Kirby* and his wife, but by *Tate* and his wife, which, *prima facie*, means out of *Wildey's*

assets. *Gill* seems, therefore, from his evidence itself, to have been misled. If I had thought it material, I would have sent for the deed. On the other hand, *Kirby* is himself examined; and he swears positively, that the money was paid out of *Willey's* assets, though it passed through *Tate's* hands. He says it was paid with money arising from the sale of *Willey's* stock in trade, and by the receipt of his book debts. He says, he inspected *Tate's* books, and was well acquainted with his transactions. Every thing which can be called evidence tends to the same conclusion. It is manifest that *Tate*, whose allotment of *Willey's* property consisted of nothing but *Old Portland House*, the stock in trade, and book debts, if this personalty was trifling, and he paid the whole price of the freehold out of his own property except the 500*l.*, received only that 500*l.* as his share of *Willey's* property, a circumstance extremely improbable. It is incredible, if such had been the circumstances, that he should have permitted, from the very beginning, and throughout the whole of the transaction, the estate to be treated as the estate of the two married women, and should never have put forward any claim of charge upon it. I consider, therefore, that pretence as a mistake. But further, if it were true, he has received the money back. He found means to mortgage the estate for 2000*l.* He received the money so raised. The mortgage, with interest, has been satisfied out of the produce of the estate. The principal sums correspond exactly. How the account of interest would stand, it is not worth inquiring. A part of the interest paid to the vendor accrued during *Tate's* possession of the estate and the assets. I consider, therefore, that the money has been repaid to *Tate*. This ground of relief also fails entirely.

During the long consideration which I have given to this case, some views of it occurred to me, according to which, upon a suit properly framed, the plaintiffs might,

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perhaps, have shewn themselves entitled to relief against this fund, but in a degree extremely limited, unless the point made, that a purchase is not within the statutes of *Eliz.*, had furnished an answer.

That circumstance, together with the novelty of the case, induces me, in dismissing this bill, to dismiss it without costs.

Let the bill be dismissed without costs.

FOWLER and Another v. HUNTER and Others.

ROBERT HUNTER, by his will, dated 17th June, 1780, gave to his eight children therein named 1050*l.* each, and the residue of his estate to his wife, *Mary Hunter*, whom he appointed his executrix.

The testator died in 1783, leaving the eight children named in his will and two children born subsequently to the date thereof.

The testator, *Robert Hunter*, in his lifetime, was a creditor of *Samuel Yeats*, of *Wotton-under-Edge*, in the county of *Gloucester*, clothier, for the sum of 1261*l.* 3*s.* 8*d.*, which *Samuel Yeats*, in the year 1782, became bankrupt. This debt was proved by the testator in his life-time, or by his widow after his decease, under the commission of bankrupt against *Yeats*, and dividends thereon to the amount of 346*l.* 17*s.* 4*d.* were received by the widow, *Margaret Hunter*, from the estate of *Yeats*.

A. having been indebted to the estate of *B.* in a sum of money, but from which he had been discharged under a commission of bankrupt, voluntarily executed to *C.*, the widow of *B.*, a bond for the payment of part of such debt, for the use of herself and children, but at her disposal. Two years afterwards, *A.* executed to *C.* another bond for the payment of the remainder of such debt, for the use and benefit of herself

and children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—*Held*, that the widow took a life interest in the money secured by the bonds, and that the principal, after her decease, became payable among the children, in such manner, and in such proportions, as she should direct; and the widow having made an exclusive appointment in favour of two of her children, it was held that such appointment was void, and that all the children took as tenants in common.

Though, generally speaking, an instrument must be construed by the provisions contained in it, and not by any thing *dehors*, yet, under the circumstances of this case:—*Held*, that the Court might call the language of the second bond into aid in construing the effect of the first.

Where there is a general power of appointment among children, and the appointment from any circumstance becomes void, the children take as tenants in common.

Samuel Yeats obtained his certificate under his commission; and, being afterwards successful in business, he, in the year 1800, wrote to *Margaret Hunter* the following letter:

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“ *Monksmill, near Wotton-under-Edge, June 4th, 1800.*

“ My dear Madam,—Although it is many years since we have kept up any correspondence, yet I can assure you there has never one year passed without my reflecting, with regret, on the loss your late husband sustained by my failure, and also upon the distress I imagined you must have since suffered in your own concerns; and on that account, I have the greater satisfaction in the subject of this letter, which I shall endeavour to explain without further preface. It has ever been the fervent prayer of my mind that I might be permitted to live long enough to make my creditors, who sustained losses by my failure, compensation for their debts, and it appeared to me that the only chance I had of ever doing it was to keep the property I have since been obtaining by my business together till I could do something for them like a full compensation. By a late investigation of my affairs, it appears that it has at length pleased God to bless my endeavours so far as to enable me to obtain property sufficient to make up the deficiency which the three dividends of my effects fell short of doing under the commission (and it was not until this late investigation that I had sufficient); but it is so disposed of in my business that it would be impossible for me to collect the whole together under a very considerable time to discharge the whole of those debts, without putting a total stop to that business by which I have been enabled to obtain the property, and throwing me again into a dependent situation, which I cannot suppose any real friend I have would wish to see me in; but, as it is as much my wish, as I conceive it to be my duty also,

5 Flare. 327.

2 Y. & Call 2p 544

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to take the earliest possible opportunity of making my creditors restitution, if I can prevail on some of my principal creditors, whom I look upon as my particular friends, to allow me to give them my bonds for the amount of the deficiency of their debts, payable in three years, with half yearly interest, it is my intention to pay the smaller creditors during the course of this month. And, as I think I cannot possibly dispose of the amount of what would be the deficiency of my debt to the late Mr. *Hunter*, so well as to secure it for the benefit of you, my dear Madam, and your family in the way that would have been most congenial to the spirit of my departed friend, and to your wishes, I shall be happy to give you the amount in one sum in such manner as you will be pleased to point out as most likely to answer that purpose; and, at the expiration of three years, I will, if required, invest the property in any other security, or, if more desirable, pay the money. I request the favour of your immediate answer, and remain respectfully, my dear Madam, your faithful and obliged friend,

Samuel Yeats."

In accordance with this letter, *Samuel Yeats* executed to *Margaret Hunter* a bond, dated the 5th June, 1800, by which he became bound to *Margaret Hunter*, therein described as the widow of the late *Robert Hunter*, of the city of *Bristol*, merchant, in the sum of 2788*l.* 13*s.* 8*d.*, to be paid to the said *Margaret Hunter*, for the use of herself and children, but at her disposal, or her certain attorney, executors, administrators, or assigns; with a condition thereunder written for making void the same, if *Samuel Yeats*, his heirs, executors, or administrators, should pay, or cause to be paid, to *Margaret Hunter*, her executors, administrators, or assigns, 1394*l.* 6*s.* 10*d.* on the 5th June, 1803, with legal interest half yearly.

The 1394*l.* 6*s.* 10*d.* secured by this bond were composed of 914*l.* 6*s.* 4*d.*, the balance of the original debt, with in-

terest thereon, from the 5th *December*, 1789, when the last dividend was declared. *Exch. Ch. in Eq.*
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After the execution of this bond, it was discovered that the interest had been improperly calculated from the day when the last dividend was declared, instead of from an earlier period; and *Samuel Yeats*, therefore, executed to *Margaret Hunter* another bond, dated 5th *June*, 1802, whereby he became bound to her as the widow of *Robert Hunter* in 685*l.* 14*s.* 8*d.*, to be paid to the said *Margaret Hunter*, or her certain attorney, executors, or administrators, *for the use and benefit of herself and children only, in what proportion among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever.* This bond was conditioned for the payment by *Samuel Yeats*, his heirs, executors, or administrators, to *Margaret Hunter*, her executors, administrators, or assigns, *for the use and benefit of herself and children only, in what proportion among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever,* of the sum of 342*l.* 17*s.* 4*d.* on the 5th *June*, 1805, together with legal interest half yearly.

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In 1803, *Samuel Yeats* wrote the following letter to *Margaret Hunter*:

“ *Monksmill, near Wotton-under-Edge, July 30th, 1803.*

“ My dear Madam—Inclosed you will receive 41*l.* 12*s.* 2*d.* to pay the interest due on my bonds to you on the 5th of last month, which you will be pleased to acknowledge accordingly.

“ As the time is now expired for which I originally proposed to hold the money for which these bonds were given you (and my other friends to whom I stand indebted under similar circumstances), the option to say whether it will be most agreeable to have the money paid in in six months from this date, or to let it remain. I will readily do the former if more agreeable to you, and it will increase the income of yourself or family, provided I can be satisfied

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the principal be secured to your daughters after your decease (to be disposed of amongst them in such proportions as you may think proper), agreeably to the plan which was proposed on your first entering into a correspondence upon this subject. I wish you to consider the convenience of yourself and family solely in your determination and reply to, my dear Madam, your sincere friend and servant,

Samuel Yeats."

Three of *Robert Hunter's* children died intestate and unmarried before either of the bonds were executed by *Samuel Yeats*.

The interest on the bonds was from time to time, until the year 1821, received by *Margaret Hunter* and applied to her own use. In that year *Samuel Yeats* paid off the bonds, and the money was invested by *Margaret Hunter* in the purchase, in her name, of 2300*l.* three *per cent.* consols, the dividends and interest of which were from time to time received by her.

Margaret Hunter died in the year 1827, having made a will dated 11th *October*, 1820, whereby she bequeathed as follows, *viz.* "I give unto my daughters, *Mrs. James Fowler* and *Mrs. Richard Fowler*, five guineas each to buy a mourning ring; I give all my plate to my two sons, *Robert Hunter* and *Jameson Hunter*, to be equally divided between them; And I give and bequeath all the residue of my property, and all property over which I have any power of appointment, unto my two daughters, *Jenny Ann Hunter* and *Maria Bush*, to be equally divided between them; the share of my said daughter, *Maria Bush*, to be for her sole and separate use, so that the same may be given, sold, or disposed of by her, or be held and enjoyed by her in exclusion of her husband, and without being under his control, or subject to his debts or engagements, and in the usual manner as if she was sole and unmarried; and I appoint my said two daughters, *Jenny Ann Hunter* and *Maria Bush* joint executrixes of this my will."

The bill was filed by *Margaret Fowler*, widow, one of the children of the testator *Robert Hunter*, and *James Fowler*, the husband of *Sarah Fowler*, deceased, another of the testator's children, against the other surviving children of the said testator, and prayed a declaration that *Margaret Hunter*, the widow of the testator, was a trustee for herself and her children, living at the dates of the bonds, of the monies secured by the bonds, and of the 2300*l.* consols, in which the same were afterwards invested; and, regard being had to the fact, that the interest of the principal monies secured by the said bonds, and the dividends of the said annuities, were received by the said *Margaret Hunter* exclusively during her life, it might be declared, that the whole of the consols became distributable at her death among her children living at the dates of the bonds respectively in equal shares, and the representatives of such of them as were since dead: and that the appointment contained in the will of *Margaret Hunter* in favour of *Jenny Ann Hunter* and *Maria Bush*, exclusively, so far as the same related to the consols, might be declared void.

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Mr. *Treslove* and Mr. *Wilbraham* for the plaintiff.— Both bonds were given *in pari materia*; one, therefore, may fairly be used to illustrate the other. The objects of *Yeats'* bounty, or rather sense of justice, were Mrs. *Hunter* and all the children: he could not have any intention to exclude any. The words, “*but at her disposal,*” cannot be read in opposition to the former passage; but only apply to the purposes to which the fund should be confined: the expression in the second bond, “*in what proportions among the latter as she may think proper to direct,*” clearly shews this. There being seven children at the time when the bonds were given, the proper application is, that the widow should take one eighth for herself, and that the remaining seven eighths should be divided among the children in such shares as she might think fit.

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Mr. *Whitmarsh* for the defendants.—It is a settled principle, that a person having the absolute disposal of money, has an absolute property in it. *Robinson v. Tickell* (a). No ascertained part being provided for the children, the wife took the whole. *Curtis v. Rippon* (b). In *Hamley v. Gilbert* (c), under a gift of residue to *A.* to be applied by her at her discretion for or towards the education of her son, without being liable to account for the application of it, the Court held, that *A.* was entitled to the whole residue, though considerable, subject to the application of so much as the Court might think fit towards the education of the son during his minority. And the Master of the Rolls, in deciding that case, observes (d)—“The question is, whether this converts her into a mere trustee; I cannot think that it was so intended; the whole is to be paid into her hands, but it cannot be supposed to be mandatory on her to lay out the whole upon her son’s education; a discretion is left her as to the *quantum*, and it must have occurred to the testatrix that there would be the *corpus* to dispose of when it was paid over to her; and as she was not to account for it, it does appear to be a gift without responsibility. What is a gift but handing over a fund with an absolute power of disposition? If it be given to you, and you may dispose of it as you please, is it not yours?” The observations made by the Master of the Rolls, in that case, may properly be applied to the present.

Mr. *Wakefield* and Mr. *Griffith Richards* for the plaintiffs.—No trust appears in the condition of the bonds, which are in the common form; and no trust was intended to be imposed, but a mere gift from *Yeats*.

(a) 8 Ves. 142.

(b) 5 Madd. 434.

(c) Jacob, 354.

(d) Id. 360.

LORD CHIEF BARON.—This is a very doubtful case. These instruments were evidently prepared by persons not in the habit of using legal language. It is to be regretted that we are continually called upon to put a construction on language which the person using it, in all probability, never intended it should bear. I am not sure, that if this case were to be brought before another Judge, he would not be of a different opinion. I think *Yeats*, the obligor, meant that the testator's widow should have the interest of the money for her life, and that she should have a power of disposing of the capital among her children. I know the general rule to be, that an instrument must be construed by the provisions contained in it, and not by any thing *dehors*. But, whatever may be the law on the subject, justice requires, in this case, that I should keep in view the language of the second instrument. The same intention seems to have continued for two years; and, I think, under the circumstances, I am entitled to use the language of the second bond in construing the first. I state this distinctly, in order that, if it shall be considered worth while to carry this case elsewhere, the manner in which I arrive at my conclusion may be understood. I think the construction which must be put on the instruments taken together is, that *Yeats* intended to give the interest of the money to the widow for her life, and the capital, after her death, to her children, in such manner, and in such shares and proportions, as she should think fit. I do not know whether I am at liberty to collect the intention from what has taken place; but if I were, then the parties seem to have acted according to the construction which I now put on the language of the bonds.

If I could not get the assistance of the second bond, I should feel very much embarrassed by the case of *Robinson v. Tickell*, which approaches very closely to the present, indeed, it comes so near to it as to be scarcely distinguishable. But, as I have said before, I think, in good sense and in justice, I am entitled, in construing the effect

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of the first, to avail myself of the light which I am able to borrow from the language of the second instrument.

I entirely concur in the opinion expressed by Sir *W. Grant*, in *Butcher v. Butcher* (a), that it is difficult to say what is an illusory appointment, where some part is appointed to each of the objects; but here, nothing being given to the other children, I must hold the appointment wholly void; and, being of that opinion, I think the three children must take as tenants in common. I have a general impression that, where there is a power of appointment among children, and the appointment from any cause fails, the children take as tenants in common.

(a) 9 Ves. 382. See the same 31, and on appeal, 16 Ves. 15. See case on appeal, 1 Ves. & B. 79. likewise *Mocatta v. Lonsada*, 12 Ves. 123. See also *Bar v. Whitbread*, 10 Ves.

July 23rd.
Nov. 11th.

Sir JOHN FREDERICK, Bart., and Others, v. COXWELL and Another.

Bill for the specific performance of a covenant, by which the defendants engaged, within two years, to procure the heir-at-law of *A. B.* to convey certain lands to the plaintiffs, or, within the same period, to prefer a petition to the House of Lords for, and to use their utmost endeavours to procure,

an act of Parliament for substituting a trustee in the place of the heir, in case such heir could not be found, or there should not be any heir. On inquiry, no heir being found, the Court decreed the defendants to allow their names to be used in an application to Parliament for the act, expressing, however, a doubt whether such an application could succeed, the estate appearing to have escheated.

The Court will not decree that which seems to be impossible; and it is more than doubtful whether the old law now prevails, by which a man was compellable to procure his wife to levy a fine.

BY indentures of lease and release, dated the 21st and 22nd May, 1813, divers lands and hereditaments were conveyed to *Katharine Long*, spinster, in fee, by way of mortgage, for securing 3000*l.* and interest.

Katharine Long died intestate as to the mortgaged premises, but having made a will, by which she appointed the defendants her executors, who, after her death, proved such will.

By indentures of lease and release, dated the 25th and 26th April, 1816, made between the defendants, of the first part; the plaintiff, *Richard Taylor* (the mortgagor), of

the second part; *William Lake*, of the third part; and the plaintiffs, Sir *John Frederick* and *Robert Hudson*, of the fourth part; in consideration of 3000*l.* paid to the defendants in satisfaction of the mortgage to *Katharine Long*, and of a further sum paid to *Taylor* (the mortgagor); the lands and hereditaments comprised in the mortgage to *Katharine Long* were conveyed to *William Lake* in fee, by way of mortgage, as a trustee for the plaintiffs, Sir *John Frederick* and *Robert Hudson*.

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By a deed of covenant bearing even date with the last-mentioned release made between the defendants of the first part; the plaintiff, *Richard Taylor*, of the second part; and the plaintiffs, Sir *John Frederick* and *Robert Hudson*, of the third part; after reciting, *inter alia*, that the defendants had been unable to ascertain who was the heir-at-law of *Katharine Long*, but that it was highly probable she had not died without an heir, the defendants covenanted, at their own costs and charges, within two years from the date of that indenture, to cause and procure the heir of *Katharine Long* to convey the premises, or, at the like costs and charges, within the said term of two years, to prefer a petition to the House of Lords for, and use their utmost endeavours to procure, an Act of Parliament for substituting some proper person to be a trustee of the premises in the room and stead of the heir-at-law of *Katharine Long*, in case such heir-at-law could not be discovered, or to become and be a trustee of the same premises, in case there should not be any heir-at-law of *Katharine Long*, and the estate should have, in consequence, escheated.

The bill was filed for the performance of the covenant contained in this deed, and prayed that the defendants might be ordered within a reasonable time specifically to perform their said covenant and agreement, by either discovering and procuring a proper conveyance from the heir-at-law of *Katharine Long*, or if no such heir-at-law

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should be discovered, then in petitioning for, and obtaining, an act of Parliament for the purpose mentioned in the covenant, or that the plaintiffs might be authorized by the Court to make the necessary inquiries for discovering such heir-at-law; and if such inquiries should be unsuccessful, then to petition for and obtain such act of Parliament as aforesaid; and that the defendants might be ordered to concur and assist the plaintiffs, and to pay the costs, charges, and expenses of and attending the same.

The defendants admitted the facts, and stated their belief, that no heir could be found; and alleged, that they were unable to apply for such act of Parliament, inasmuch as they were advised that there was an escheat to the Crown; and they submitted that the Attorney-General ought to be made a party to the suit.

By the decree made on the hearing the cause, dated 2nd *November*, 1824, it was referred to the Master to inquire whether there was any heir-at-law of *Katharine Long*, and who was such heir.

The Master, by his report, certified that he did not find that there was any heir-at-law of *Katharine Long*.

The cause now came on for further directions, the point for discussion being, whether the Court would decree a specific performance of the covenant to apply for and obtain the act of Parliament. Very little argument, however, took place, in consequence of Mr. *Preston*, for the plaintiffs, observing, that he had reasons, from some circumstances, to believe that an heir-at-law was in existence, and would very shortly be found.

Mr. *Preston*, and Mr. *Moore*, for the plaintiffs.

Mr. *Knight*, for the defendants.

LORD CHIEF BARON.—The question in this case is, what relief shall be given in equity against a person

who has entered into this covenant. [*His Lordship then stated the covenant, and detailed the facts of the case.*] If an heir could have been found, very little doubt could be entertained as to the manner in which he might have been compelled to convey. The failure of an heir causes some difficulty, but not, as it seems to me, an insurmountable difficulty. If the covenant had been expressly to obtain an Act of Parliament, it would be different, for it might be impossible to do so, according to the rules of the legislature; but the covenant is not to procure an Act, but only to petition for an Act, and to use their best endeavours in obtaining it. The Court will not decree an impossibility. Even the old law, by which a husband was compellable to procure his wife to levy a fine according to his covenant, seems now to be shaken. But I think there would be no difficulty in giving the plaintiffs the benefit of this covenant, by decreeing the defendants to permit their names to be used in an application to Parliament for the necessary Act. I very much doubt, however, whether such an application will succeed. By the late statute (a) his Majesty is authorized, where trust property escheats to the Crown, by sign manual to direct the execution of the trusts, and to make grants to trustees for that purpose. I think I shall not stretch the jurisdiction of this Court, if I direct that the defendants shall permit their names to be used in such application to Parliament, by petition or otherwise, as the Master shall appoint, in case the parties differ about the same. The defendants must pay the costs up to the present time. Continue the cause in the paper, and reserve further directions and subsequent costs.

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(a) 39 & 40 Geo. 3, c. 88, s. 42.

END OF MICHAELMAS TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Exchequer.

IN

HILARY TERM, 10 & 11 GEO. IV., AND THE SITTINGS AFTER.

MEMORANDUM.

1830.

UPON the 3rd of *February*, Mr. Serjeant *Bosanquet* took his seat upon the Bench of the Court of *Common Pleas*, having been previously appointed one of the Puisne Judges of that Court, upon the resignation of Mr. Justice *Burrough*.

EXCHEQUER OF PLEAS.

WILLIS v. NEWHAM.

A verbal acknowledgment of the payment of part of a debt within six years, is not sufficient within the stat. 9 Geo. 4, c. 14, to take the case out of the statute of limitations.

ASSUMPSIT against the defendant as the maker of a promissory note, dated the 26th *September*, 1811. Pleas — *Non assumpsit*, and *non assumpsit infra sex annos*.

At the trial, before *Bayley*, J., at the Summer Assizes, 1828, for *Yorkshire*, the plaintiff, having proved the handwriting of the defendant to the note, called two witnesses, who proved verbal acknowledgments by the defendant, that he had made payments in respect of the note

within six years. Upon this evidence, the learned Judge was of opinion that although proof of actual payment of interest would be an answer to the statute of limitations, within the provisions of the stat. 9 Geo. 4, c. 14, yet evidence of an acknowledgment of payment was within the mischief that statute was intended to prevent; and, therefore, nonsuited the plaintiff, giving him leave to move to enter a verdict for the amount of the principal and interest due upon the note.

Jones, Serjt., accordingly, in *Michaelmas* Term, obtained a rule to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff; against which—

Brougham shewed cause.—Great inconvenience resulted from the admission of parol evidence to defeat a plea of the statute of limitations; to remedy which the stat. 9 Geo. 4, c. 14, was passed, and its object was to engraft the provisions of the statute of frauds upon the statute of limitations. The effect of that act is, that no acknowledgment of the existence of a debt, or promise to pay it, shall be binding upon the party, unless the acknowledgment or promise be in writing signed by the party to be charged thereby. An acknowledgment of, or a promise to pay, a debt, furnishes a presumption of the existence of the demand; and a payment of part of a debt shews that the debt, in respect of which the payment is made, is unsatisfied. It is admitted, that a direct acknowledgment of, or promise to pay, the debt, must be in writing, to satisfy the provisions of the late act; and yet, it is contended, that the acknowledgment of a payment may be good by parol. Now, if the ground upon which the payment is evidence of the existence of the debt, be, that it raises a presumption that the debt is still in existence, and it be admitted that a direct ac-

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14 Bear : 342.

42. B. . 605

32. B. . 740

12 A.C. . 494

1 A.C. (18) 307

6 A.C. . 212.

12 M. & W. 512.

9 M. & W. 616.

1 M. & W. 252.

7 M. & W. 531.

2 B. & B. . 450.

6 B. & B. 478

3 B. & B. 390.

2 B. & B. 725.

2 B. & B. 612.

2 B. & B. 63.

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knowledge must be in writing, *a fortiori*, the admission of that which only amounts to an acknowledgment of the existence of the debt must be in writing also. But it will be said, that the proviso exempts the case of payments from the operation of the preceding parts of the clause. That proviso is, that "nothing therein contained shall alter, lessen, or take away the effect of *any payment* of any principal or interest." It leaves the mode of proof untouched; and if it can be shewn that effect can be given to the words of the proviso, without encountering the mischief at which the statute was aimed, the Court will adopt that construction. It would be mischievous to allow the payment to be proved by the admission of the party and by the witness's construction of a loose and unsatisfactory conversation, equally as in the case of an acknowledgment of or promise to pay the debt; and effect will be given to the proviso, by saying that, in the case of payment, the act can only be satisfied by a written acknowledgment of the payment, or by the actual evidence of the party in whose presence the payment was made.

Jones, Serjt.—Before the late act, the Judges were constantly employed in ascertaining the meaning of words; and against this continual conflict of equivocal phrases and vague admissions of the existence of a debt, the modern stat. 9 *Geo.* 4, c. 14, levelled its power. But the proviso, according to the general rule of construction, takes the case of payment entirely out of the operation of the act, and leaves the payment to be proved as before the modern enactment. This argument would be sufficient, if the danger in the two cases were the same; but the case of payment is not open to the same danger as the admission of an acknowledgment of the existence of the debt. The admission of a naked fact can scarcely be misrepresented. To exclude this evidence will be to exclude all parol tes-

timony in such a case; and upon the same reasoning a stated account, taking credit for payments, would be insufficient to prove the payment, unless it were signed by the party who was to be charged with its contents.

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Cur. adv. vult.

GARROW, B., now delivered the judgment of the Court as follows:—This was an action of *assumpsit* upon a promissory note for the sum of 200*l.* with interest, dated 26th September, 1811, to which the defendant pleaded the general issue, and the statute of limitations. The cause was tried before Mr. Justice Bayley, at York; and the report, sent in by that learned Judge, states very fully the evidence which was given at the trial. After proving the note, the plaintiff, for the purpose of taking the case out of the statute of limitations, called the Sheriff's officer by whom the defendant was arrested, who proved, that when he arrested the defendant, he told him that he did so at the suit of the plaintiff, when the defendant said, that it was a hard case that he should be arrested, as he had paid the plaintiff 10*l.* only a short time before. The plaintiff's attorney was also called for the same purpose; and he stated, that, having made arrangements with the defendant with respect to the payment of the interest upon the note, he called upon the defendant, and complained that he had not performed his promise, when the defendant told him that he had not been able to pay the interest, but had paid the plaintiff 10*l.* since the arrangement had been made. Under these circumstances the learned Judge reports, that he was disposed to think, that, under the stat. 9 Geo. 4, c. 14, though proof of actual payment of interest would be an answer to the statute of limitations, evidence of an acknowledgment of payment was within the mischief that statute was intended to prevent. He therefore nonsuited the plaintiff, and gave him leave to move to

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enter a verdict for the principal and interest due upon the note.

The propriety of this nonsuit depends upon the construction of the stat. 9 *Geo.* 4, c. 14; for the salutary provisions of which the public are under the greatest obligations to the learned Lord who introduced it, and upon which we are now required, for the first time, to put a construction.

It appears to me, that this nonsuit was right, and that it ought not to be disturbed; in which opinion the learned Judges, before whom the case was argued, concur. The act recites the English statute of limitations and the Irish statute upon the same subject. Upon the plain construction of these statutes, if this were a new question, it certainly would be very difficult to contend that any action could be maintained after the period limited by them respectively. Such seems to have been the impression of those learned persons who at first were called upon to put a construction upon the English act; but from a very early period to the present time a different rule has prevailed, and although the time limited by the statute may have elapsed, the plaintiff has been permitted to prove an acknowledgment of or promise to pay the debt within six years, which has been holden sufficient to entitle the plaintiff to recover. This course was manifestly fraught with the greatest mischief, and was open to the greatest misrepresentation and fraud; and accordingly experience has shewn that it has led to various questions and contentions, upon which the opinions of the learned Judges have not at all times been uniform. To prevent such questions, and to give effect to the existing enactments, this act was passed, which contains a particular provision, "that in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any par-

ty of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." Upon this part of the statute it is impossible to raise a doubt. The act says, if a debt be of more than six years' standing, it shall not be taken out of the statute of limitations by a loose and vague conversation, which may be misrepresented, but only by a written promise or acknowledgment signed by the party to be charged thereby, which cannot be misrepresented, and cannot deceive. But it is said, that a subsequent part of the act expressly contemplates a case like the present, and leaves this case untouched. The proviso is in these words:—"Provided always, that nothing herein contained shall alter or take away, or lessen, the effect of any payment of any principal or interest made by any person whatsoever." This proviso leaves the case as the former part of the clause left it. Payment of principal or interest is evidence of the subsistence of the debt, and shews that the payee has a demand against the party who makes the payment. But what is there in this proviso to exempt this case from the general operation of the statute. It is not, that nothing therein contained shall alter the mode of proving, by words only, the acknowledgment of payment, but that it shall not lessen the effect of any payment, if properly proved. It appears, therefore, to us, that the previous enactment must be engrafted upon this proviso, and that the whole must be taken together, namely, that the payment must be proved not by a verbal acknowledgment, but by evidence of the actual payment, or by a writing such as the act requires, and that, being so proved, it shall have the same effect as it had before the passing of the act.

In the course of the argument, the case of an account current was put, in which the party charges himself and takes credit for payments made by him; and it was said, shall not this be evidence to take the case out of the sta-

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tute of limitations? I answer no, because the act says, the defendant shall not be charged except by an acknowledgment in writing, signed by him. It must be a writing with the solemnity of a signature, and nothing short of that can bind the party.

Towards the close of the argument, it was submitted, that this case was not within the mischief at which the statute was levelled; but it appears to me to be within the mischief equally as the case of a promise or acknowledgment, which, it is admitted, would be unavailing unless in writing signed by the party. The statute consults the interest of both the creditor and debtor; for if the creditor is to rely upon the evidence of a Sheriff's officer or attorney, or upon the substance of a loose and unsatisfactory conversation, he may lose his witness, or the witness, from circumstances which may occur, may lose his memory, or may not be in a humour to recollect or tell the whole of what passed.

Upon these grounds, we are of opinion that this case is within the mischief provided against, and that the proviso which saves the effect of a payment of any principal or interest, does not exempt that case from the general enactment, which says, that no acknowledgment shall be binding which is by words only. The rule, therefore, must be

Discharged.

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DEBT for penalties upon the coal act, 47 Geo. 3, c. 68, The *first* count of the declaration stated, that J. G. purchased of the defendant, and the defendant sold to J. G. a certain quantity of coals, to wit, &c., as and for wharf measure, to be delivered to the said J. G. at &c., within the district of the office of the principal Land Coal Meters for &c., which coals were sent to J. G. by the defendant, the vendor thereof, in a waggon; that, after the coals were so sent, J. G., being dissatisfied with the measure of the coals, signified to the carman attending the waggon, that he desired to have the coals remeasured, and sent to the wharf of the defendant a notice in writing that the coals were to be remeasured; and also forthwith sent a notice in writing to the office of the principal Land Coal Meters of his desire to have the coals remeasured; whereupon one C. G., a labouring meter belonging to the office, *within two hours* next after such notice in writing was left at the office, did attend *from the office at the premises of J. G. the purchaser*, to wit, &c., as was expressed in the notice, for the purpose of remeasuring the coals; that J. G. did not, before or immediately after the arrival of the said meter, or at any other time, signify to the meter his option or desire as to what way he would wish such remeasurement to be taken, whereupon the said C. G., as such meter, in the presence of J. G. the purchaser, (neither the defendant nor any agent or servant of the defendant having attended for the purpose of seeing the coals remeasured), remeasured the coals, so as to ascertain the whole quantity contained in all the sacks wherein the coals were sent, taken together, (more than one sack not having been then shot or delivered from the waggon into or upon the premises of J. G. the purchaser); and that, in such re-

The coal act, 47 Geo. 3, c. 68, s. 116, enacts, that if a purchaser be dissatisfied with the measure of his coals, he shall send a notice to the office of the principal Land Coal Meters, whereupon a meter, within the space of two hours next after such notice left at the office, shall "attend from the office at the house of the purchaser," to remeasure the coals; and sect. 120, imposes a penalty upon the principal meter, if he shall "neglect or refuse within the space of two hours after the receipt of the notice, to send a meter to the house of the purchaser:"—*Held*, that these two sections must be read together, and that it is sufficient to satisfy the words of the 117th sect. if the meter leave the office within two hours after the receipt of the notice, and proceed with due diligence to the house of the purchaser, although he do not arrive there within that time.

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measurement of the coals, it did appear to the said C. G., as such meter, that the coals so remeasured did not in fact amount to the quantity for which they were sold, to wit, &c., but, on the contrary, amounted to a quantity, to wit, &c., being a quantity much less, to wit, &c., than the quantity for which the coals were sold, contrary, &c., whereby, &c., concluding for a penalty of 5*l.* for every bushel deficient in the measure. The declaration contained other counts, varying the name of the purchaser; and *two* counts, which omitted the allegation that the meter attended from the office at the house of the purchaser (a).
Plea—*Nil debet*.

At the trial before *Park, J.*, at the *Surry* Summer Assizes, 1829, the deficiency in the measure was proved to the satisfaction of the Jury. It appeared also, that the meter left the office of the principal Land Coal Meters, within two hours after the notice to remeasure had been delivered, but did not arrive at the house of the purchaser within that time; upon which, it was objected, that the attendance of the meter within that time was a condition precedent to the remeasurement; and that having failed to prove this, the plaintiff ought to be nonsuited. The learned Judge overruled the objection, giving the plaintiff leave to move to enter a nonsuit; and the Jury found a verdict for the plaintiff.

In *Michaelmas* Term, *Andrews*, Serjt., obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered.

Gurney, (*Jemmett* was with him), shewed cause.—By the stat. 47 *Geo.* 3, c. 68, s. 116, if any purchaser, or his or

(a) Upon this ground, the rule was also to arrest the judgment, but as the judgment did not proceed

upon that ground, the arguments upon that part of the rule are omitted.

her servant, shall be dissatisfied with the measure of any coals sent to him, her, or them, and shall signify to the carman his, her, or their desire to have the coals remeasured, then the carman is required to remain at the premises of the purchaser of such coals with such coals and the cart or other carriage, until such coals are remeasured, under a penalty of 10*l*. The 117th section enacts, that such purchaser, desiring such coals to be remeasured, shall send, or cause to be sent, to the vendor of such coals, or to his, her, or their wharf, warehouse, or place of abode, notice in writing that the said coals are to be remeasured, and such purchaser shall also forthwith send notice in writing to any one of the offices of the respective Land Coal Meters, of his, her, or their desire to have such coals remeasured; and thereupon a principal meter, or one of the labouring meters, (not being the meter under whose inspection the said coals were originally measured), shall, *within the space of two hours* next after such notice in writing left at the office of any such principal Land Coal Meters, *attend from such office where such notice shall be so left, at the house, lodging, or other premises of such purchaser as shall be expressed in such notice, for the purpose of remeasuring the said coals, and shall accordingly remeasure the same in the presence of the vendor or vendors, and purchaser or purchasers of the said coals, or of his, her, or their agent or servant, if they or any of them shall attend to see the same remeasured; and in case such vendor or purchaser, or his, her, or their agent, shall not attend for the purpose of seeing the coals remeasured, then the meter shall proceed in the remeasuring of such coals in his, her, or their absence.* At first sight it would appear to be the duty of the meter to attend at the house of the purchaser, within the space of two hours after the notice has been left. The first objection to that construction is, its practical impossibility; for the distance would, in many

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cases, render the attendance within that time impossible. The time, therefore, must apply to the setting out from the office: and another clause in the Act of Parliament shews clearly that such was the intention of the Legislature. By the 120th sect. a penalty is imposed upon the principal meters if they “neglect or refuse, within the space of two hours after the receipt of notice, to send a labouring meter to the house, &c. of the purchaser.” This section is decisive of the construction which is to be put upon the section upon which this action proceeds; for both must be read together. By the former, the meter is required to attend from the office within the space of two hours at the house of the purchaser; and by the latter, the principal meter is subjected to a penalty if he do not send a labouring meter from the office within that time. The meaning of the attendance is, therefore, that he shall set out within two hours, and as there is no pretence that the meter did not use due diligence, the allegation in the count, that he did attend from the office within two hours, at the house of the purchaser, is proved by shewing, that he left the office within that time. But the allegation is unnecessary, because the penalty is imposed upon the deficiency of the measure, when ascertained.

Andrews, Serjt., and Thesiger, contra.—If a meaning is to be given to the words used, it is clear, that the meter must not only leave the office, but be at the house of the purchaser within the space of two hours—not only the literal meaning of the words, but the intention of the clause also, shews, that such must be the construction. The enactment is for the protection both of the vendor and the purchaser; the latter may have the coals remeasured, but the former is to have the opportunity of being present at the remeasurement, and for that purpose a particular time is specified, within which the remeasurement must be made. Again,

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by sect. 116, the carman is bound to attend until the coals are remeasured, and it is impossible that he should be required to attend with the waggon and horses an indefinite time. It is said, however, that sect. 120, affords a key to the construction of the former clause. With reference to that clause, it is sufficient to say, that it was made with a different view, and that it imposes upon the principal meter a separate and distinct penalty for the breach of a separate duty. But that clause is not itself clear from doubt; for, consistently with the words, it may mean that the labouring meter shall be sent from the office so as to arrive at the house of the purchaser within two hours. If, then, it be the true construction of the clause, that the meter shall attend at the house within two hours, it follows, that he must attend within that time to subject the defendant to the penalty. "The rule is, that affirmatives in statutes that introduce new laws, do imply a negative of all that is not in the purview." *Slade v. Deake* (a). "Wherefore every statute that limits a thing to be done in a particular form, although it be spoken in the affirmative, includes in itself a negative; viz. that it shall not be done otherwise." *Standling v. Morgan* (b). From this it follows, that the meter could attend at no other time, so as to charge the defendant, for the time at which he is to attend is specified in the same section, and is not, as was said, merely directory.

Cur. adv. vult.

GARROW, B.—This was an action to recover penalties against the defendant, upon the stat. 47 Geo. 3, c. 68, for selling coals to a customer, which, upon being remeasured, were ascertained to be deficient in quantity. The 117th section, upon which this action is founded, directs that the purchaser, if dissatisfied with the measure, shall send a

(a) Hob. 298.

(b) Plowd. 206.

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notice to the Meters' office, and that within the space of two hours next after such notice in writing left at the office, a meter shall attend from the office at the house of the purchaser. It was admitted in the argument, that the meter left the office within the space of two hours next after the notice had been left, but did not attend at the house of the purchaser within that time; upon which it was contended for the defendant, that those counts which contained an allegation that the meter did attend at the house of the purchaser within that time were not proved, and that the attendance within that time being a condition precedent to the liability of the defendant, the counts which omitted that averment could not be sustained. These questions depend upon the construction of the Act of Parliament. On the one hand it is contended, that the attendance of the meter within that time would, in many instances, be impossible; and that the 117th section is explained by the 120th section, which imposes a penalty upon the principal meter if he shall neglect or refuse, within the space of two hours after the receipt of such notice, to send a labouring meter to the house of the purchaser. On the other hand, it is insisted that the words of the statute are imperative, and that affirmatives in a statute implying a negative, the attendance must be within that time, to fix the coal merchant with the penalty. It appears to us, that the former construction is correct. Upon the words of the 117th section it might be doubtful whether the attendance *from the office* might not be construed to mean that the meter shall leave the office within the time; but coupling those words with the provisions of the 120th section to which I have alluded, the propriety of that construction is put beyond doubt. But it is said, that this latter section imposes a separate penalty upon the principal meter for the breach of a separate duty. The whole act must be construed together. The principal meter performs his duty if he dispatches a labouring

meter from his office any time within two hours after the notice is left, and the purchaser who wishes to have his coals remeasured, cannot compel the attendance of a meter before that time. If, therefore, we were to hold that the meter must be at the house of the purchaser within that time, in order to subject the coal merchant to the penalty, it would follow that the purchaser might do all that was required of him, and that the principal meter might also strictly perform his duty, and yet, that the coal merchant, however fraudulent the measure might be, might be discharged from his liability. We therefore are of opinion, that the attendance required by the 117th section means, that the meter must leave the office within two hours after the notice is left for the purpose of going to the house of the purchaser, and that therefore the allegation, that he did so attend, was proved.

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Rule discharged.

REVENUE BRANCH.

The ATTORNEY-GENERAL v. BURNIE and Another.

THIS was an information filed by his Majesty's Attorney-General, against the defendants as executors of the last will and testament of *William Moffatt*, Esq., deceased, to recover a legacy duty of 3450*l.* 4*s.* 6*d.*, charged in the said information to be due to the Crown from the said defendants, as executors, upon the residue of certain personal property bequeathed by the said testator to the said executors, for the benefit and use of *William Moffatt* the younger, and

A bequest of a "residue, of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the testator's son and his wife, (a stranger in blood), for their lives, with re-

mainder to the grandchildren of the testator, in equal proportions;" is liable to legacy duty, to be calculated at the rate of 1*l.* per cent. for the son's moiety, and 10*l.* per cent. for that of the wife, upon the principle that the son and his wife each take a life-interest in one moiety of the income of the residue.

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Jane, his wife, as joint-tenants, in equal moieties, for their lives. To this information, the executors pleaded that they did not owe the said sum of 3450*l.* 4*s.* 6*d.*, and thereupon issue was joined.

Upon the trial, before *Alexander*, L. C. B., at *Westminster*, at the sittings after *Trinity* Term, 1829, a verdict was taken for the Crown by consent, for the said sum of 3450*l.* 4*s.* 6*d.*, subject to the following case for the opinion of the Court.

“ The testator, *William Moffatt*, made his last will and testament in writing, bearing date the 21st day of *November*, in the year of our Lord 1820, whereof the following is a copy:—

‘ In the name of God, Amen.—I, *William Moffatt*, of *Wimbledon*, in the county of *Surrey*, being truly sensible of the uncertainty of human life, do make this my last will and testament, revoking all former wills by me at any time heretofore made.—*Imprimis*, I give to *William Burnie*, of *Woodford*, in the county of *Essex*, Esq.; the Rev. *James Eyre Harington*, of *Sapcote*, in the county of *Leicester*; *Mary Philpot*, of *Kensington*, and *Anne Philpot*, of *Hans Place*, in the county of *Middlesex*; the sum of 1200*l.* *per annum*, in Bank Long Annuities, invested or to be invested in Bank Long Annuities, in trust for the use and benefit of my dearly beloved wife *Elizabeth Moffatt*, now in an unfortunate state of derangement, under the care of Doctor *Middleton*, at or near *Southampton*, for and during the whole term of her natural life, in lieu of, and on the express condition that all claim by marriage-settlement or otherwise, particularly a provisional settlement of 10,000*l.*, dated the 28th day of *December*, 1795, in which *Robert Lowth*, *James Eyre Harington*, *William Moffatt*, jun., and *Robert Stewart*, are named as trustees, shall be relinquished, cancelled, and given up to my executors, and not otherwise; and to each of my trustees above-named, I give the sum of 1000*l.* of good and lawful money

of Great Britain; to my executors hereafter named, I give in trust as follows:—To my grandsons, *William Palmer Moffatt*, *Charles Moffatt*, and *Henry Moffatt*, I give the sum of 5000*l.* each, at their respective ages of twenty-four years; to my grand-daughters, *Ann Moffatt* and *Elisabeth Palmer Moffatt*, I give the sum of 5000*l.* each, at their respective ages of twenty-four years, or the day of marriage respectively; to my grandsons, *Rowland Moffatt Moffatt*, *Cornelius William Moffatt*, and *Eustace J. John Douglas Moffatt*, I give the sum of 5000*l.* each, at their respective ages of twenty-four years; to my grand-daughters, *Jane Moffatt*, *Margaret Thould Moffatt*, *Clara Frances Moffatt*, and *Charlotte Augusta Moffatt*, also to *Mary Moffatt* and *Laura Moffatt*, I give the sum of 5000*l.* each, at the respective ages of twenty-four years, or day of marriage respectively; to Miss *Anne Philpot* before-mentioned, I give the sum of 3000*l.*; to my niece *Mary Elizabeth Moffatt*, I give the sum of 2000*l.*; to *Alexander Allan of Lander*, and his wife *Elisabeth*, formerly *Elisabeth Moffatt*, I give 1000*l.*; to *William Burnie*, Esq., I give 1000*l.*; to each of his children by his wife *Anne*, formerly *Anne Lind*, I give 100*l.*; to my son *William Moffatt*, I give my Sun Fire Office stock and Sun Life Office stock; to *Hannah Finch*, I give an annuity of 60*l.* per annum for her natural life; to *Eleanor Ramsey*, I give an annuity of 50*l.* per annum for life, if she shall continue in the service of my wife so long as my executors or trustees shall think it necessary to retain the said *Eleanor Rachael Ramsey* in the service of my wife; to *Elisabeth Kinggitt*, I give 100*l.*, if she shall be in my service at the time of my decease; and I hereby constitute and appoint *William Burnie*, Esq., my son *William Moffatt*, the Rev. *James Eyre Harington*, and *Charles Alexander Hacket*, of *Birchin Lane*, *London*, executors of this my last will and testament. And I give to each of my said executors the sum of 1000*l.* of lawful money. The remainder of my property, of whatever it

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may consist, such money as arises from it, to be invested in the public funds; the interest to be appropriated to the use of my said son *William Moffatt*, and his wife *Jane*, for their lives, with remainder to my grand-children in equal proportions. The whole of this my will written with my hand, this 21st day of *November*, 1820.

Witness.

William Moffatt, (L. S.).

"The testator died on the 28th day of *January*, A. D. 1822, without revoking his said will, leaving the said *William Burnie* and the said *William Moffatt* the son, him surviving; who alone proved the said will, and took upon themselves the execation thereof, and afterwards assented to the said bequest of the residue.

"The said *William Moffatt*, one of the devisees for life of the residue bequeathed by the said will, is the son of the said testator, and the said *Jane*, the wife of the said *William Moffatt* the son, is a stranger in blood to the said testator. The said *William Moffatt* the son, and *Jane* his wife, are both living, and there are several of the testator's grandchildren also living.

"On a calculation agreed to on both parts, made pursuant to the act, 36 Geo. 3, c. 52, it appears, that if the shares of *William Moffatt*, the son, and *Jane* his wife, in the income of the residue, are to be calculated separately, upon the principle, that each takes an interest in a moiety of the income for his and her life; the value of the moiety of *William Moffatt* the son, for his life, amounts to the sum of 89,318l. 14s., and the value of the moiety of *Jane*, the wife of *William Moffatt* the son, for her life, amounts to the sum of 31,750l. 8s. 8d. If the legacy duty, payable by the said executors to the Crown upon the life-interests of the said *William Moffatt* and *Jane* his wife, in the income of the said clear residue, is payable upon the value of each of these moieties separately, the duty payable in respect of the value of the moiety of the said *William Moffatt* the son, at the rate

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of 1*l.* per cent., amounts to the sum of 293*l.* 3*s.* 8*d.*, and the duty payable in respect of the value of the moiety of the said *Jane*, the wife of the said *William Moffatt* the son, at the rate of 10*l.* per cent., amounts to 3157*l.* 0*s.* 10*d.*, amounting together to the sum of 3450*l.* 4*s.* 6*d.* But if the legacy duty now payable by the said executors to the Crown is to be calculated at the rate of 1*l.* per cent. upon the income of the whole residue for the life of the said *William Moffatt* the son, subject to a future payment to be made on the value of the share of the said *Jane Moffatt*, if she survives her husband, and thereby comes into possession of the whole income, it will amount to the sum of 586*l.* 7*s.* 5*d.*

“ The executors tendered to the Crown before the filing of this information the said sum of 586*l.* 7*s.* 5*d.*, which the Crown refused to accept.

“ The questions for the opinion of the Court were—

“ *First.* Whether the legacy duty payable on the life-interests of the said *William* and *Jane Moffatt*, in the residue of the testator's estate, was to be calculated upon the principle, that *William Moffatt* and *Jane* his wife each took a life-interest in one moiety of the income of the residue, namely at the rate of 1*l.* per cent. on the value of the said *William Moffatt's* moiety for his life, and 10*l.* per cent. on the value of the moiety of *Jane* his wife for her life; or,

“ *Secondly.* Whether the legacy duty now payable was to be calculated upon the principle, that the said *William Moffatt* the son took the income of the whole residue, for his own life, in his own right, with a contingent reversion of the same income to his wife if she survived him, for her life, namely, at the rate of 1*l.* per cent. on the value of the income of the whole residue for the life of the said *William Moffatt* the son, subject to a future payment to be made on the value of the share of the said *Jane Moffatt*, in the case of her surviving her husband.

“ If the Court should be of opinion that the duty was now payable separately on the value of each moiety, at the rate

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of 1*l. per cent.* on *William Moffatt's* moiety, and at the rate of 10*l. per cent.* on the moiety of *Jane* his wife, a verdict was to be entered for the Crown for 3450*l. 4s. 6d.*

But if the Court should be of opinion that the duty was payable on the value of the income of the whole residue for the life of the said *William Moffatt* the son, at the rate of 1*l. per cent.*, subject to a future payment to be made on the value of the share of the said *Jane Moffatt* in the case of her surviving her husband, a verdict was to be entered for the Crown for 586*l. 7s. 5d.*

Amos, for the Crown.—The question in this case depends upon the residuary devise, coupled with the fact that *William Moffatt*, as appears by the will, is the son of the testator, and that *Jane* his wife is a stranger in blood to the testator.

The stat. 55 *Geo. 3*, c. 184, sch. part 3, provides that, “for every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or other testamentary instrument of any person who shall have died after the 5th day of *April*, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof; and which shall be paid, delivered, retained, satisfied, or discharged, after the thirty-first day of *August*, 1815: where any such legacy or residue, or any share of such residue, shall have been given, or have devolved to or for the benefit of a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestors of the deceased, a duty at and after the rate of 1*l. per cent.* on the amount or value thereof; and where any legacy or residue, or any share of such residue, shall have been given, or have devolved to or for the be-

nefit of any person in any other degree of collateral consanguinity to the deceased than is described, or to or for the benefit of a *stranger in blood to the deceased*, a duty at and after the rate of 10*l. per centum* on the amount, or value thereof." The stat. 36 Geo. 3, c. 52, s. 16, may also be applicable to this question. That statute enacts "that when any legacy or residue, or part of residue, shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be chargeable with any duty thereby imposed, and some of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or persons respectively in such bequest; and if any person or persons chargeable with duty, and entitled in joint-tenancy as aforesaid, shall become entitled by survivorship, or by severance of the joint-tenancy, to any larger interest in the property bequeathed than that in respect of which such duty shall have been paid, then, and in such case, all and every such person or persons, so becoming entitled by survivorship or by severance, shall be charged with the same duty as if such property, to which such joint-tenants shall so become entitled, had been originally given to and for the benefit of such person or persons only.

A construction has been put upon these statutes in the case of *The Attorney-General v. Bacchus* (a), an authority entitled to the greatest consideration, inasmuch as that case was twice argued in this Court, and the judgment was afterwards affirmed in the Court of *Exchequer Chamber*. That was a bequest of the residue of the testator's property to his son-in-law *George Bacchus*, and *Priscilla* his daughter, the wife of *George Bacchus*, for their absolute benefit; and the Court held that, in that case, one moiety of the legacy was liable to a duty of 1*l. per cent.*, and the other to a duty of 10*l. per cent.* If this case were

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(a) 9 Price, 30; 11 Price, 547.

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to be decided upon the strict marital rights of the parties, the argument could not be carried farther than it was in the argument of that case. But it is clear, from the language of the Lord Chief Baron (a), and of the Lord Chief Justice of the Court of King's Bench (b), that that case was not decided upon the strict marital rights of the parties, but upon the degree of relationship to the testator. Viewing this case, therefore, abstractedly from the question of marital rights, is not the wife a legatee equally with her husband? The words of the bequest are, "the remainder of my property, of whatever kind it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the use of my son William and his wife Jane." In another part of the will, other property is given to the son alone; and in this part, the wife is joined, clearly because the testator intended to confer some benefit upon her. It would be a fraud on the testator, if the son did not appropriate the legacy to the use of his wife, or if, deserting his wife, he were to consume this legacy without applying it to her support. No distinction is made between the husband and wife, the legacy is for the use of the husband and wife jointly, and therefore she is as much a legatee as her husband. In *The Attorney General v. Baskley*, the Lord Chief Baron said, "my difficulty is this, it is urged that the husband has the sole beneficial interest, but it seems to me that he has not, unless it can be shown that the wife has no interest in it in the event of her surviving the husband." That argument applies to this case, because, here the testator has most anxiously guarded the rights of the wife, in the event of her surviving her husband, by directing that the principal shall remain in the public funds, and the interest shall only be payable as and in manner, whereas, in that case, the legacy was at the

(a) 9 Price, 30.

(b) 11 Price, 547.

absolute disposal of the wife, and the right of the wife, in the event of her surviving her husband, would depend upon whether the husband reduced the legacy into possession.

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Alderson, contra.—The authority of the case of *The Attorney-General v. Baccus* cannot now be impeached; but the question is not, whether the Court will overrule that decision, but whether they will extend it to the present case, which carries the question still further. In that case, the Court decided contrary to the general law of the land with respect to the rights of the husband, with a view to avoid the great inconvenience and hardship which would have arisen from a contrary decision; but in this case the hardship is reversed. The real question here is, what is the meaning of this will? which must be construed according to the intention of the testator. Now, there can be no difficulty in ascertaining here what was the real intention of the testator; and, admitting that the legacy duty must be calculated upon the beneficial interest of the respective parties, still the interest taken must be calculated at the lesser sum, and not according to principles contended for by the Crown. The stat. 36 Geo. 3, c. 52, directs, that each party shall pay the legacy duty according to the amount of his interest; and the interest which the wife takes depends upon the construction of the devise. What is the meaning of the interest being appropriated to ~~William Moffatt and Jane~~ his wife, for their lives? Is it for their joint or their successive lives? If for their joint lives, this absurdity would follow, that, upon the death of the husband or wife, the property would immediately go over to their children. But the plainest and most obvious construction is, that the son should take the interest for his life, that the wife should take it for her life, if she survived him, with remainder to the grand-children, after the death of both. That is the principle upon which the duty has been calculated at the lesser sum, and it would be a very

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hard case if the words of the will were not construed according to this plain and simple construction. In *The Attorney-General v. Bacchus*, the residue was absolutely bequeathed, and there could be no calculation of the interest in succession. If a residue be bequeathed to *A.* and *B.*, they must take the whole, or take it in moieties; and that was the ground upon which the Crown contended for the larger duty; because, *B.* being the husband of *A.*, it was a bequest of the whole, and not in moieties, and the husband took the whole. This Court, however, said, that, for the purposes of calculating the duty, it must be held that the husband and wife took in moieties. Looking to the beneficial interest of the parties, the wife has only an interest of survivorship which arises in the case of her husband's death. Trying the case by the test whether, if the husband could only obtain payment of the legacy through the intervention of a Court of Equity, that Court would appropriate a portion of the legacy for the benefit of the wife, supposing it to be a bequest to the husband for life, and to the wife after his death; it is clear that a Court of Equity would not interfere for her benefit, because, during his life, he would have the absolute dominion over it, and after his death, without the assistance of a Court of Equity, the wife might call upon the trustees to pay the interest to her. There is no case of a bequest to pay the interest to *A.* and *B.* his wife, for their lives, in which a Court of Equity has interfered. This case, therefore, is the simplest possible, depending alone upon the construction of the will. If it was the intention of the testator that his son should take the interest for his life, and that, after his decease, his wife should have it, the lesser sum only is payable; and that such was the intention of the testator is obvious from the absurdity which would follow from a different construction; namely, that if it be for their joint lives, upon the death of either of them, the interest would go over to the grandchildren of the testator.

Amos, in reply.—It is supposed that there are but two ways of construing this bequest: namely, an estate for their joint lives; and an estate for their successive lives. But there is a third way of considering it; namely, that it is a joint-tenancy. It is a very common form of bequest, and, independently of marital rights, every one would say, the bequest created a joint-tenancy. If an estate for successive lives were meant, the testator would have given the interest to his son for life, and after his decease to his wife. That is the obvious mode of creating such an estate; and had that been the intention of the testator, he could not possibly have expressed himself in the form he did.

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Cur. adv. vult.

ALEXANDER, L. C. B.—The question in this case arises upon the 55 *Geo.* 3, c. 184; and the facts of the case are these:—The testator, *William Moffatt*, by his will, made in 1820, after various legacies and bequests, bequeathed in the following words: “The remainder of my property, of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the use of my son *William Moffatt* and his wife *Jane*, for their lives, with remainder to my grandchildren in equal portions.” The legacy act charges every legacy or residue that shall have been given to or for the benefit of a child of the deceased, with a duty for, at, and after, the rate of 1*l.* *per cent.*; and after several intermediate rates, according to the degree of relationship, it charges every legacy or residue, or share of residue, that shall have been given to or for the benefit of any person in any other degree of collateral consanguinity to the deceased then before described, or to or for the benefit of any stranger in blood to the deceased, with a duty after the rate of 10*l.* *per cent.* on the value.

The legatee, *William Moffatt*, being the son of the tes-

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tator, and *Jane*, the wife of that son, being a stranger in blood to the testator, a question has arisen, after what rate the duty on the bequest I have before stated is to be calculated. One party contends that it ought to be calculated upon the principle, that *William Moffatt* and *Jane* his wife each took a life interest in one moiety of this residue. The consequence of which would be, that one moiety of the income given to *William Moffatt* would be chargeable with a duty of 11. *per cent.* on its value, and that the other moiety of the income, supposed to have been given to *Jane* his wife, would be chargeable with the duty of 10. *per cent.* upon its value. The other view which has been taken of this case is, that the whole residue is to be considered as having been given to *William* the son, for his life, with a contingent limitation to *Jane* his wife, for her life, if she should happen to survive her husband. The argument in favour of this view of the case is mainly founded upon the legal consequences which, as it has been said, and truly said, give to the husband during his life an absolute power and dominion over the fund, though his wife, in the form of the gift, is a joint tenant with him.

An anterior statute upon the same subject has been referred to in the argument, it is the 36 Geo. 3, c. 52, s. 15; by which it was enacted, that where legacies are given in joint-tenancy to any person or persons, some or one of whom shall be chargeable with any duty imposed by that act, and others shall not be so chargeable, such persons chargeable shall pay according to their interest in such bequest; and in case a person shall, by severance or survivorship, become entitled to a larger interest than he has before paid for, he shall be charged as if the said legacy had been originally given to him only. I confess it does not appear to me that this act varies the question or assists either view of it. The object of that act is to charge the duty upon the interest given. I think that, upon the true construction of the 55 Geo. 3, the duty is imposed upon the gift contained in

the testator's will; and that we cannot properly take into our consideration the manner in which, by force of the marital rights of the husband, the bequest may ultimately operate; though the law of the land may transfer to the husband an interest in what is given to the wife, the husband obtains it, because it is given to his wife; and the duty is imposed on the gift contained in the testator's will.

It appears to me, that the case which has been referred to in the course of the debate, almost shuts out all argument upon the subject: I mean *The Attorney-General v. Bacchus*, which is reported in the 9th volume of Mr. Price's Reports, p. 33, and which is also reported in the Court of Error, in the 11th of Price, p. 547. The only differences between that case and the present are—that, in that case, the whole corpus of the residue was given, and here it is a life-interest only. In that case, the wife was the near relation of the testator; in this case, the relation is the husband, he is the son of the testator, his relationship is that of a son. The words of that bequest are, “I give and bequeath the same, (that is, his residue) unto my son-in-law *George Bacchus*, and my daughter *Priscilla* his wife, their executors, administrators, and assigns, for their absolute benefit. In that case it was directed, that the fund should be divided in the manner in which it is proposed to be done here. And I am not able to distinguish between the present and that case. It appears to me, that the rule which guided that case should guide this. If I entertained a doubt upon the subject, I should think it safer to follow what has been solemnly decided in this Court, and affirmed in the superior Court by the highest authorities. There must therefore be a verdict for the Crown for 3450*l.* 4*s.* 6*d.*

The Court are unanimous in the result of this decision. I alone am responsible for the reasons which I have stated.

Verdict for the Crown—3450*l.* 4*s.* 6*d.*

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In the Matter of the Charity of JOSEPH FRANKLIN.

A bequest to the poor of the parish of *A.*, of 50*l.* per annum, to be laid out at Christmas in bread, and distributed by the minister, &c., to the most needy objects in the parish, is liable to the legacy duty at the rate of 10*l.* per cent., payable upon the whole sum.

JOSEPH FRANKLIN, by his will, gave and bequeathed to the poor of the parish of *Haddenham*, in the county of *Bucks*, 50*l.* per annum for ever, to be laid out at Christmas in bread, and distributed by the minister and churchwardens to the most needy objects in the parish. The testator charged all his leasehold and personal property with this, amongst other legacies, and appointed *Joseph Franklin* and two others his executors. In 1813, the testator died, and the executors, under a decree of the Court of *Chancery*, transferred to the name of the Accountant-General the sum of 1666*l.* 13*s.* 4*d.* Bank 3*l.* per cent. Annuities; the interest to be paid to the minister and churchwardens of the parish of *Haddenham* for the time being, and to be applied by them to the charitable purposes mentioned in the will. The poor of the parish of *Haddenham* consist of upwards of 820 persons, and no one person, in the course of a year, can receive more than the value of 2*s.* in bread, on account of this charity.

Legacy duty having been claimed upon this bequest, these facts were stated in a petition; and the question was, whether legacy duty was payable upon this bequest.

Roupell and Lowndes for the petition.—The stat. 55 *Geo.* 3, c. 184, sch. 3, after providing for the rate of duty to be paid upon legacies in respect of relationship to the testator, directs, that any legacy to or for the benefit of *any person*, stranger in blood to the deceased, shall be charged at the rate of 10*l.* per cent. on the amount or value thereof. Now, this legacy is not given to any particular individuals, but is to be laid out in bread, and to be distributed by the minister and churchwardens to the most needy objects in the parish. The objects of the charity are so numerous, that no one person can receive more than 2*s.* annually,

13 *Line*, 80.
16. 11. 11.
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and the question is, whether this pittance is to be held liable to the legacy duty. Now, is there any person here, or any one for whose benefit there is any legacy? It is a general charitable bequest to the poor of the parish. If it be said, that the poor are to be taken collectively as trustees, as they are the persons who are beneficially entitled, it must be remembered that different duties are payable according to the different degrees of consanguinity of the legatees. Suppose, therefore, that the poor are to be considered the legatees, it may happen that several of the number who receive may be near of kin and related to the testator. Moreover, no duty is payable upon any legacy not amounting to 20l.; if, therefore, the poor are to be considered as trustees, no one individual is interested to that amount. But upon what scale is the duty to be calculated? The objects of the charity may be related to the testator in different degrees, and, therefore, the duty must attach, if at all, in different degrees also.

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The *Solicitor-General* and *Boteler, contra.*—Bequests of this description have uniformly paid the legacy duty. By the terms of the gift, the legacy is to be distributed to the most needy objects in the parish. Now, it is impossible to say how many there may be who may be considered entitled to this gift as the most needy objects: they may be reduced to two, or even to one. Unless the number can be reduced to a certainty, so as to ascertain the amount which each person would take, the legacy duty attaches upon the *corpus*. But this case has been argued upon the words of the statute. The schedule referred to, before imposing the rates of duty, provides for every legacy, specific, pecuniary, or of any other description, of the amount or value of 20l. or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of *April*, 1805, either out of his or her personal or moveable

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estate, or out of, or charged upon, his or her real or heritable estate, or out of any monies to arise by sale, mortgage, or other disposal of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of *August*, 1815. The object to be charged by this clause is a legacy. It goes on to provide for the case of a residue, where the clear residue devolving to one person, or the share devolving to two or more persons, is of the value of 20l.; but this question depends upon the first, and is untouched by the second provision. If a legacy be given to a class of persons, and each take less than 20l.; still, as it goes to them in a class, they take it *qua* class, and it is liable to legacy duty. This legacy exceeds 20l., and as there are no means of ascertaining with certainty what each party may take, they take in a class, and the duty is payable by the class upon the whole amount.

Roupell, in reply.—The practice, whatever it may have been, will not touch the present question, which must be decided, not by the practice, but by the law. But it is said, that where a legacy is given to a class, it was the intention of the Legislature to impose the duty upon the class, upon the whole legatees, and not upon the individuals who take under that class. The act furnishes an answer to that argument. It says, “for the clear residue, when devolving to one person, and for every share of the clear residue, when devolving to two or more persons, whether the title shall ensue by any testamentary disposition or otherwise, where the residue or share shall be of the value of 20l. or upwards.” If, therefore, a legacy of 1000l. be given to a person in trust for a class of persons, the legacy duty is not payable upon the whole sum, but each legatee pays according to his share, according to his de-

grae of relationship. But, according to the argument, the duty is chargeable upon the whole sum, as if all the persons stood in the situation of strangers to the testator.

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The VICE-CHANCELLOR.—I confess it appears to me that this is a legacy upon which the duty ought to be paid; because, although it is not expressed to be given to any individual, it is in effect given in such a manner, as that the executor holds it in trust for certain purposes. The mode in which the legacy is to be applied does not admit of its being ascertained what share, or what precise benefit any one individual will have in the legacy so given. It is given to the poor of the parish, to be laid out in bread at Christmas, and distributed to the most needy objects in the parish. It is in effect a gift for charitable purposes. Now, the Legislature seems to have supposed, that in cases where the degrees of relationship, in which the persons who participate in the legacy or share of the residue stood to the testator, could be ascertained, there should be a progressive charge, increasing with the distance of kin; but here the legacy is so given, that the kindred seemed to be out of the question, and there was a complete sum of 50*l.* for charitable purposes. With respect to legacies given to charities, there has been, by the general assent of mankind, a construction put upon the statutes, so as to charge such bequests with legacy duty. Where legacies have been given to treasurers of hospitals, and other charitable institutions, it has been considered as a matter of course to pay the duty. My opinion is, that the legacy duty is payable. It is impossible to resort to the particular scale of *per centage* payable, in order to ascertain whether the duty be or be not payable at all.

The petition must therefore be dismissed with costs.

Petition dismissed (a).

(a) This case was decided on the 5th November, 1829.

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EXCHEQUER CHAMBER IN EQUITY.

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In a suit for tithes by the rector, the defendant set up a real composition of 10s., as covering, with other lands, the lands in his occupation. In support of that defence he proved, that, in the reign of *Charles the Second*, the lands in question were divided among three persons, on a partition, and from which persons the title was regularly deduced by numerous instruments, many of which conveyed the tithes of the portions of the lands comprised in them; and, from some of them, it appeared that a money payment, parcel of a larger payment, amounting to 10s., was provided for the parson, in lieu of the tithes: he also proved, that, in 1666, in an action, on the statute, for not setting out

BILL by the rector of the rectory of *Saint John the Baptist*, with the chapel of the Blessed Virgin *Mary* annexed, at *Devizes*, in the county of *Wilts*, and, as such, claiming to be entitled to all tithes, as well great as small, against an occupier of lands, for an account and satisfaction of and for the tithes of all titheable matters.

The defendant, by his answer, admitted the plaintiff to be rector, but denied that the plaintiff, as such rector, did become, or had, ever since his presentation, institution, or induction, been, or was then, entitled to have, receive, and take the tithes, great and small, yearly arising, growing, renewing and increasing in and throughout the said parish of *Saint John the Baptist* and the said chapelry, or the titheable places thereof, or any compensation or satisfaction for the same, save and except as thereafter mentioned, and save also and except that some compensation or satisfaction for and in respect of a certain close of land, in the said parish of *Saint John the Baptist*, called or known by the name of *Nestcroft Hill*, containing three acres or thereabouts, had, for many years past, as the defendant had heard and believed, been paid to the rector for the time being of the said parish. And he denied, that the tithes of all or any of the titheable matters and things yearly arising, growing, renewing, and increasing in and throughout the said parish, and the titheable places thereof, had in all or any former times or time been set out for

tithes, by the then rector, against an occupier of the lands, a verdict was found for the defendant. It appeared from the evidence, that tithes had been rendered prior to the reign of *Edward the Second*, but from that period no trace could be found of any tithe having ever been rendered; nor was there any evidence of the payment of the 10s. or any part of it: there was no reference in the pleadings, or in the evidence, to the actual deed of composition. The Court held, that there was not sufficient evidence from which a real composition could, in the present state of the law, be inferred; and decreed an account, with costs.

It is clearly settled, that mere non-payment will not support the defence of a real composition, nor be evidence from whence to presume the deed which must have been the foundation of it.

or rendered and paid by the several owners or occupiers of land within the said parish, or the titheable places thereof, to the former rectors for the time being, or a compensation or satisfaction made to them for the same, or, in particular, of the farm and lands occupied by the defendant, or any part thereof; or that the plaintiff, since his said induction, had taken and received the tithes of the several titheable matters and things which had arisen on most or any of the lands within the said rectory and parish, or a compensation or satisfaction for the same, save and except as hereinafter mentioned, and save and except so far as related to the said close called *Nestcroft Hill*. The defendant then stated, that, within the said parish of *Saint John the Baptist*, at *Devixes*, there was situate a large tract or district of land consisting of six hundred acres (*the boundaries of which were described in the answer*), which was formerly a park attached to the castle of *Devixes*, and was part of the possessions of the kings of *England*; which said tract or district was commoly called or known by the name of the Old Park, or the Old Disparked Park of *Devixes* or *Devise*, or *Vyse*. That the defendant, from the month of *September*, 1824, to the month of *September*, 1825, held and occupied a certain farm and lands, parcel of the said tract or district of land, containing altogether one hundred and ninety-three acres of land or thereabouts, and situate within the said parish; and that, from the month of *September*, 1825, he had held and occupied one hundred and eighty-three acres, or thereabouts, of the said farm and lands, within the said parish; that he believed and doubted not to be able to prove, that no tithes in kind then were, or for many ages past had been, rendered or paid of, for, or in respect of, the titheable matters and things yearly arising, growing, renewing, and increasing in and upon the said tract or district of land, called the Old Park or the Old Disparked Park of *Devixes*, or *Devise*, or *Vyse*, or any part or parcel thereof; for that anciently, and long before the

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reign of her late majesty Queen *Elizabeth*, a certain deed or instrument of composition real, was duly made and executed by and between the then owner or owners of the said tract or district of land, and the then rector of the said rectory and parish church, with the assent of the then patron and ordinary of the said rectory and parish church, whereby all and singular the tithes, as well great as small, yearly arising, growing, renewing, and increasing, in and throughout the said tract or district of land, were granted to the owner or owners of the said tract or district of land, and his and their heirs and assigns; and the occupiers of the said tract or district of land, for the time being, were discharged of and from the payment of all the tithes, as well great as small, of the said tract or district of land; and whereby the yearly composition, rent, or payment of 10s. was granted or made issuing and payable out of the said tract or district of land, by the owners and occupiers thereof, at a certain day in every year, to the rector of the said parish and parish church, and his successors, for and in lieu and full satisfaction of all and singular the tithes, as well great as small, yearly arising, renewing, and increasing in and throughout the said tract or district of land; but he believed, that the deed or instrument by which the said composition real was effected, had perished from age, or had been lost; or, at least, the same had not yet been discovered by the defendant. And he believed, that, ever since the execution of the said deed of composition, all and singular the tithes yearly arising, growing, renewing, and increasing, in and throughout the said tract or district of land, had been enjoyed by the owners of the said tract or district of land, and the occupiers thereof under them, or the owners or occupiers of the said tract or district of land had held and enjoyed the same, freed and discharged of and from the payment of all tithes; and the said ancient yearly composition, rent, or payment of 10s., had, ever since the execution of the said deed of composition, been, and the same then

was, lawfully due and payable; and the same ought to be, and till of late years had been, regularly and duly paid by the owners and occupiers of the said tract or district of land, called the Old Park or the Old Disparked Park of *Devixes*, or *Devixe*, or *Vyse*, for the time being, to the rector for the time being of the said rectory and parish church, and till of late years had been regularly received by such rector in lieu and full satisfaction of all the tithes, as well great as small, yearly arising, renewing, and increasing, in and upon the said tract or district of land. And he believed, that, from the time of the execution of the said deed of composition, until some time in or about the year 1819, when the said plaintiff filed his bill of complaint in this Court against *Benjamin Webb Anstie*, the defendant's father, for an account of the tithes of the said farm and lands then in the occupation of the defendant, and which were then in the occupation of his said father, no demand was ever made by the plaintiff, or by any of his predecessors, rectors of the said parish, of any tithes or tenths, of, for, or in respect of the said tract or district of land, called the Old Park or the Old Disparked Park, or any part thereof; save and except that, in or about the fourteenth year of the reign of his late Majesty King *Charles* the Second, an action of debt was commenced in his Majesty's Court of *King's Bench* by the then rector of the said parish, against the then occupier of certain lands, parcel of the said tract or district of land, called the Old Park or the Old Disparked Park, for subtraction of tithes claimed by such rector to be due in respect of such lands; which action was tried at the Assizes holden for the county of *Wilts*, at *Salisbury*, in the same year, and a verdict passed therein for the defendant in such action, on the ground that the said yearly composition, rent, or payment of 10s. was payable to such rector in lieu and satisfaction of the tithes of the said tract or district of land.

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The defendant admitted his perception of titheable mat-

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ters; and, in answer to a special charge in the bill, admitted that the lands held by him had been, and were, charged to the church rates, and poor rates, and taxes of the said parish of *Saint John the Baptist*, and that the same had been included in perambulations of the said parish; and that the defendant and the former occupiers of the said lands had paid such rates; and that their servants had acquired settlements by living and serving there. And he believed, that the former occupiers thereof, or some of them, had attended divine service in the said church, as their parish church, and had attended communion and taken the sacrament there, and their children had been christened within the said church; and that when members of the family had married, or had died, they were married at the said church, and buried in the church-yard, as their parish church.

The plaintiff, in the first instance, gave in evidence the admissions in the answer, and copies of institutions to the rectory, the copies being agreed to be admitted as evidence; and also an admission on the part of the defendant, that the institutions shewed that the rectory was uniformly in the patronage of the Crown, or of its grantees.

The evidence on the part of the defendant consisted of a record from the Tower of *London*; of an inquisition *ad quod damnum*, in the 8th year of the reign of King *Edward* the Second, 1280; from which it appeared, that King *Edward* the First, when the park first came to his hands, and his ancestors, had formerly yielded the tithe of hay from the meadows being in the park of *Devises*.—That King *Edward* the First, in the 10th year of his reign, caused the meadows to be turned into pasture by *Ralph de Sandwyck*, then constable of the Castle of *Devises*, for the support of the deer and animals of the king; and from that time, and until the time of the inquisition, tithe had not been yielded or paid.—That some of the meadows were afterwards sold by *Margaret*, the Queen of King *Edward*

the Second.—The inquisition found that the tithe arising from the meadows, when tithe used to be given, was worth yearly twenty-two shillings. What took place upon this inquisition did not appear.

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The defendant also gave in evidence a deed, dated 22nd *January*, 1662, being a deed of covenant between *Henry*, Earl of *Stirline*, and *Mary*, Countess of *Stirline*, of the first part; Sir *Robert Croke*, and Dame *Susan Croke*, his wife, of the second part; and *Henry Zinzan*, and *Jacoba*, his wife, of the third part; (the said *Mary*, Countess of *Stirline*, Dame *Susan Croke*, and *Jacoba Zinzan*, being the three daughters and co-heiresses of Sir *Peter Vanlore*). The deed purported to be a covenant to levy a fine of their lands and estates held in coparcenary, in order to a partition, and, after a grant of the old and new parks of *Devizes*, contained the following words: “*with all the appurtenances, situate, lying, and being, coming, growing, arising, and renewing within the said parks.*”

A deed of partition, dated 10th *June*, 1664, between the same parties as the deed of covenant. By this deed, the old park was divided into three parts, and each of the parties agreed to bear a third part of the chief-rent, (*amount not stated*), due to the king, and also of all other rents, duties, payments, customs, and services, issuing, due, or payable for or out of the premises.

The defendant also gave in evidence various deeds and conveyances, tracing the title to the three parts into which the old and new parks were divided under the last-mentioned instruments. In some of them, tithes were mentioned and conveyed; and in several of them, among charges to which the property was stated to be subject, appeared the sum of 3*s.* 4*d.*, part of a sum of 10*s.*, as payable to the minister of the parish church of *St. John the Baptist*, in the borough of *Devizes*.

The defendant also produced the record of an action in the *King's Bench*, in *Trinity Term*, 14 *Car.* 2, 1663; in

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which the Rev. *Henry Johnson*, the then rector of the parish, was plaintiff, and *William Powell*, an occupier, as the declaration stated, of 40 acres of land, was defendant, and in which action a verdict was found for the defendant (a).

The defendant also produced a terrier, dated 4th *October*, 1704, signed by the rector and two churchwardens, purporting to be "a terrier of all such glebe lands, tithes, and dues of and belonging to the rectory, as appeared to be due and had been paid unto the rector for twenty years past." In this terrier certain tenements and gardens, on which the parsonage house had formerly stood, were stated to belong to the rector; and the rector was also represented to be entitled to the feeding of the churchyard, and to 4*d.* for every woman churched; and to be also entitled to the tithes of a certain orchard called *Nestcroft Hill*, containing about two acres, in the possession of *Matthew Figgins*, and which tithes were then let to the said *Matthew Figgins* at the yearly rent of 10*s.* The sum total of the profits was stated to be 5*l.* 8*s.* No other tithes were mentioned in the terrier, than those of the orchard called *Nestcroft Hill*.

The defendant also produced a terrier, on the first visitation of the bishop of *Salisbury*, in 1783, signed by the rector and two churchwardens, and several inhabitants, and stated to be a "terrier of the parsonage, *vis.* of the house, glebe land, and whatever else belongs thereto." In this terrier, the parsonage house, purchased, then about seven years back, by Queen *Anne's* bounty, and several tenements and gardens, were described and particularized, but no mention was made of any tithes.

The defendant likewise gave in evidence the return of the bishop of *Salisbury*, in *January*, 1809, to the Gover-

(a) Mr. *Johnson* was shewn to have been the rector at that time, by a terrier, and *Powell* was shewn to have been, in 1666, an occupier of 40 acres of land and upwards, in the

park, by an old map made in 1662, and by his being named in the deed of partition as tenant of part of the park fields.

nors of Queen *Anne's* bounty; by which return it was stated, that *St. John's*, in *Devizes*, was a rectory augmented and discharged, and that its yearly value was 132*l.*, arising from voluntary contributions, rent of cottages, and augmentation.

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The defendant examined several old witnesses, who proved, that, to their knowledge, no tithes in kind, or any composition for tithes, had ever been paid for or in respect of the tract or district called the Old Park or Old Disparked Park: and that the orchard called *Nestcroft Hill* was not part of, nor within the tract or district called the Old Park or Old Disparked Park.

He also proved, by ancient maps, the boundaries of the park, and that the defendant's lands formed part of the park, and the division of the park lands among a great number of persons.

Mr. *Boteler*, and Mr. *Wright*, for the defendant, contended, that the evidence adduced by the defendant, on which they commented at considerable length, was such as to satisfy the Court, that there was a composition real; and that, although the actual deed creating the composition could not be produced, yet there was sufficient evidence to induce the Court to presume that such a deed did formerly exist. That the words in the first deed, "*coming, growing, arising, and renewing*," could only have reference to tithes, and shewed that the owner of the lands at that time were entitled to the tithes. The following cases were cited on the part of the defendant: *Heywood v. Nicholls* (a), *Sawbridge v. Benton* (b), *Williams v. Bacon* (c), *Knight v. Halsey* (d), *Berney v. Harvey* (e),

(a) 3 E. & Y. 1272.

(b) 2 Anstr. 372; 2 E. & Y. 400.

(c) 1 Sim. & Stu. 415; 3 E. & Y. 1105, 1178.

(d) 7 T. R. 86; 2 Bos. & Pul.

172; 8 Bro. P. C. Toml. edit. 233;

2 E. & Y. 438.

(e) 17 Ves. 119; 2 E. & Y. 585.

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Lady Dartmouth v. Roberts (a), Bennett v. Neale (b), and Estcourt v. Kingscote (c).

The plaintiff, to rebut the defendant's case, gave in evidence an assize roll, 32 *Ed.* 1, by which the churches of *Devixes* were given by King *John*, then Earl of *Dorset*, to *William de Farnhall*; and the fine rolls, 33 *Ed.* 1, from which it appeared, that *Matthew Fitz John* surrendered the castle of *Devixes*, and the churches of *Devixes*, to that King.

Mr. *Jervis*, and Mr. *Roupell*, for the plaintiff.—A composition real cannot be proved by reputation of its having existed, though corroborated by non-payment of tithe, unless the deed be produced, or evidence of its having existed be given. *Chatfield v. Fryer (d)*. In the present case, there is no evidence of the existence of any deed, or of a payment under any deed. In the late case of *Pritchett v. Honeyborne (e)*, evidence of reputation of a particular fact was rejected. Evidence that the payment was made prior to the time of Queen *Elizabeth*, is not sufficient to support the composition, without proving that a deed once existed. *Bennett v. Skeffington (f)*. It is clear, in the present case, that no deed ever did or ever could exist. It is admitted, that the right of presentation has always been in the Crown. The inquisition put in by the defendant makes out the plaintiff's case. That the Crown had not the rectory before the time of legal memory, is clear from the documents put in on the part of the plaintiff. The documents shew that the park at one time paid tithes. The

(a) 16 East, 334; 2 E. & Y.
656.

(b) Wightw. 324; 2 E. & Y.
630.

(c) 4 Madd. 140; 3 E. & Y.
948.

(d) 1 Price, 253; 3 E. & Y.
707.

(e) 1 Younge & Jervis, 135.

(f) 4 Price, 143; Dan. 10; 3
E. & Y. 827.

allegation in the answer, of a deed of composition having been executed, is not supported by the evidence; for, at the time when that deed must have been executed, the Crown was both patron and owner, and could have granted by letters patent only; and none are to be found. *Lady Dartmouth v. Roberts*, has been relied on, as shewing that not only a deed, but even letters patent may be presumed: it is, however, no authority in the present instance. In that case, a grant of a particular portion of tithes was presumed under special circumstances; but it was the case of a portion of tithes. The words "*growing, arising, and renewing*," found in the deeds, might have reference to woods and underwoods, which are of annual increase; and not, as suggested, to tithes. Under the word castle, a manor would also pass, with its casual profits, such as fines and heriots, which would also satisfy the words "*growing, arising, and renewing*." No mention appears to be made of tithes in any of the deeds, till about 1777. The name of *Matthew Figgins* occurs in a deed of this date. It appears by the terriers, that there was a payment by a person of the name of *Matthew Figgins*, of a sum of 10s., and it has been endeavoured to confound this with the present alleged composition. There is no mention in the deeds of the property being exempt from tithes, by the payment of this composition real. The deed of 4th *July*, 1680, on the division of the estate into thirds, does not contain any covenant for payment of any part of this composition real. The verdict in 1662, in the action for subtraction of tithes, is not entitled to any weight, a record of that nature not being conclusive of, nor even evidence of, the right. The rector, in an action of that description, was bound to prove his title, the occupation of lands by the defendant, and that the lands produced titheable matters: failure in the proof of any one of those particulars would entitle the defendant to a verdict,

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and so would the subsistence of an agreement for a temporary composition. The observations made by Lord *Kenyon*, in *Knight v. Halsey*, were used by him in a question respecting the mode of tithing hops, and would appear to have been wholly uncalled for in that case. In *Sawbridge v. Benton*, there was clear evidence of the payment up to a given period. In the present case, there is no evidence of the payment. The terriers were used for the purpose of excluding a conclusion; but would appear to have another effect, for it has been often said, that there is no good *modus* which is not to be found in terriers; and here the circumstance, that the composition real is not mentioned, affords strong evidence that it did not then exist. *Ridley v. Storey* (a), *Bennett v. Skeffington* (b), *Robinson v. Appleton* (c), *Smith v. Goddard* (d), *Heathcote v. Mainwaring* (e), *Hawes v. Swaine* (f), and *Chatfield v. Fryer* (g), were also cited for the plaintiff.

Mr. *Boteler*, in reply.—The words “*growing, arising, and renewing*,” in the deed of 1622, could only have reference to tithes. The verdict in the action in the *King’s Bench*, in the time of King *Charles* the Second, must unquestionably have gone on the ground of the exemption, for the other points suggested on the part of the plaintiff would have been the subject of nonsuit. The evidence given by the defendant ought to satisfy the Court that there was a deed of composition real. Many of the cases cited on the other side do unquestionably shew that the composition-deed must be produced, or evidence be given that it once existed. In none of those cases did the evidence come near to the evidence in the present case, but

(a) Dan. 157; 3 E. & Y. 918.

(d) 4 Wood, 586.

(b) 4 Price, 143; Dan. 10; 3 E. & Y. 827.

(e) 3 Bro. C. C. 217; 2 E. & Y. 366.

(c) 4 Wood, 10; 3 E. & Y. 1268.

(f) 2 Cox, 179; 2 E. & Y. 357.

(g) 1 Price, 253; 3 E. & Y. 707.

went chiefly to prove moduses. In *Robinson v. Appleton*, all the evidence tended to prove moduses. In this case we have not given any evidence in support of a modus, but only evidence to warrant the presumption of a grant. The grant of the tithes is a circumstance which will induce the Court to infer, that there was a deed of composition. In *Hawes v. Swaine*, the Lord Chief Baron said, that although the Court had very properly relaxed in its practice, and did not now (as it formerly did), insist upon the production of the original instrument, yet, they certainly expected that, in order to establish a real composition, the evidence should shew something that would distinguish it from a prescriptive payment. The evidence of the leases and dealings with the tithes in this case, distinguishes it from a case of prescription. In *Heathcote v. Mainwaring*, the language used in citing the cases of *Hawes v. Swaine*, and *Smith v. Goddard*, seems to go further than those cases warrant. In *Bennett v. Skeffington*, the evidence did not approach the evidence in the present case. *Sawbridge v. Benton*, and other cases, have been mentioned, in which there was certainly other evidence: we do not carry our case quite so far, but only refer to those cases as making out the proposition for which we contend.

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Cur. adv. vult.

THE LORD CHIEF BARON.—If this case had depended on an accurate acquaintance with the deeds, I should have thought it necessary to examine them attentively. But it turns upon a point of tithe law raised by facts which are not in dispute. It is a bill by a rector. The defence is a real composition. The defendant must have known that a modus was a defence which in this case could not have been sustained. The long usage of non-payment, and the other evidence of a prescriptive commutation for money for the tithe in kind, would have been overturned by documents proving that

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tithes in kind were due, and rendered, after the time of legal memory. This is the present state of the law. He was therefore obliged to defend himself upon the ground of a real composition, which may originate long after the time of legal memory, and at any time before the restraining statute of the 13 *Eliz.* c. 10.

The question for the opinion of the Court is, whether there is evidence before it, from which, as the law stands, it can refuse the rector the relief he asks, upon the principle, that the proper parties had entered into what the law calls a real composition.

A real composition is an agreement, by which the landowner on the one part, and the parson, patron, and ordinary on the other, contract that the parson shall not receive tithes in kind, but, in lieu of them, and, as a compensation for them, shall have land, or some other emolument. Unquestionably, the compensation may be, as in this case it is averred to be, an annual money payment. To make this arrangement valid, it must have been carried into execution by deed. It is to be collected from our books, that at first, after the restraining statute, it was deemed necessary, in order to support the defence of a composition real, to produce the very deed in which the contract was contained.

It has been however often said, and is now clearly settled, that the production of the deed itself is not essential to the defence. If the former existence be duly alleged, that existence may be presumed upon principles analogous to those rules of presumption, which the Courts have established in other cases of lost instruments. I must say analogous, with some guard, because tithes are in many respects anomalous. The rules of presumption applied to them, though they bear some resemblance to the rules in other cases, yet have, in some respects, striking differences.

It is quite a clear proposition, which will not be disputed, that mere non-payment of tithes, bare of all other circumstances, will never constitute a defence against a spiritual person, shewing a *prima facie* title to them. It is clear, that mere non-payment will not establish the defence of real composition, nor be evidence from whence to presume the deed which must have been the foundation of it. Something more is necessary—something more is shewn in this case, and what I have had to consider is, whether it is of that character which is in law sufficient for the purpose.

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The lands, the tithes of part of which are now in question, were, in the reign of *Charles* the Second, the property of a gentleman of the name of *Vanlore*. He had three daughters, upon whom, as co-parceners, his estate descended: one married *Henry*, Earl of *Hastings*; another married Sir *Robert Croke*; the third, a gentleman named *Zinsan*.

There was first a deed of partition in thirds, and afterwards many instruments are produced, which deduce the title from some of those families to the present proprietor. Many of the deeds convey the tithes of those portions of the lands which are comprised in them, and some of them shew that a small money payment, parcel of a larger one, amounting to 10s., was provided for the parson in lieu of the tithes.

The other evidence consists of a verdict in an action for not setting out the tithes, on the statute of *Edward*, which passed for the defendants. I take it also as an unquestioned fact, that no trace of any tithe ever having been set out after the reign of *Edward* the Second, is to be found. I take it also to be equally clear, that there is no evidence whatever of the payment of the 10s. or any part of it. It has in truth and fact been a pure *non decimando*.

Upon this case the question is, whether the deed, the

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verdict, and the non-render of the tithes, are evidence, from which a real composition can, in the present state of the law, be inferred. The objection to it is, that the rule requires there should be a reference to some specific instrument or deed containing the contract. If this be necessary, the defence must fail. I conceive it to be certain, that neither in the pleadings, nor, what is of more consequence, in the evidence, is there the least reference to any such instrument, or to any writing under hand and seal.

The question then is, is there sufficient evidence to shew that such a deed had once existed? A long series of cases has said and determined, that a real composition cannot be acted upon without some evidence that such a deed had been executed. This is said in opposition to the evidence allowed in a case of modus, which is a real composition made before time of memory.

The authorities to which I allude, are those which have been cited in the argument. I do not think it material to do more than refer to them: *Robinson v. Appleton* (a), *Hawes v. Swaine* (b), *Hpathote v. Malmoring* (c), *Chatfield v. Fryer* (d), and *Bennet v. Neale* (e). In the latter Mr. Baron Wood stated, and urged with great ability, his opinion, that usage alone would be sufficient evidence of a composition real. The other three judges were of a different opinion.

The point decided in the last case was, that the defence being pleaded as a modus, and the evidence pointing at a composition real, the Court would not direct an issue to try it as a composition real.

In the subsequent case of *Bennet v. Skeffington* (f), Chief Baron Richards decreed for the plaintiff, because

(a) 3 Eagle & Y. 1268.

(d) 1 Price, 253; 8 E. & Y. 707.

(b) 2 Cox, 179; 2 Eagle & Y. 357.

(e) Wightw. 324; 2 E. & Y. 630.

(c) 3 Bro. C. C. 217, 2 E. & Y. 367.

(f) 4 Price, 143; Dan. 10; 3 E. & Y. 827.

though the evidence referred to an agreement, it was to a parol agreement only. *Exch. Ch. in Eq.*
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One reason given in these cases is, that if the usual general evidence which is sufficient to support a modus, were sufficient evidence of a composition real, it would sustain every bad modus, by changing the name and calling it a composition real. It is manifest that it would, in a great measure, destroy the objection of rankness, and would in every case have sustained those moduses which have been set aside because there has appeared, from ancient instruments, a period at which tithes in kind have been rendered. The fate of all those cases shews distinctly that evidence of usage was not considered as sufficient to support a composition real. It was certainly, in early times, considered that the identical deed itself must be produced; and it is only of late that the rule has been relaxed, and that it has been said, that it may be proved by presumptive evidence. Some cases have been cited on the part of the defendant. Not one of them contains a decision respecting a composition real. The general language of Lord *Kenyon* in *Knight v. Halsey* has also been referred to. The strongest cases referred to in the argument are such as respected a portion of tithes. Those cases come very close to that which I have been examining. A portion of tithes can only be severed from the rectory by a deed of the same description with that which might constitute a composition real.

In some of those cases, it does, certainly, appear to have been the opinion of the Court, that when there were many conveyances of the tithes, and a long usage according to those conveyances, a severance of the portion of tithes from the rectory ought to be presumed in favour of the long deduction of title and inveterate usage. But a distinction arises upon those cases, depending upon the fact, whether the possessor of the tithes was a different person from the owner of the lands, or was the same person. In the one case the tithes would be actually

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rendered from year to year by the occupier to the tithe owner; there would be a manifest, visible, and notorious possession of the tithes by the claimant, and, therefore, without any express reference to the deed of severance, it appears that, in this case, a presumption of such a deed has been sustained. These are the cases urged for the defendant in this argument. But, on the other hand, where it is the owner of the land who has from the beginning shewn a title to the tithes by his own conveyance, there no such presumption has been allowed. That is the sort of case to which all the authorities refer, which decide that there must be some evidence referring to the deed.

If it were otherwise, the consequence so often stated would follow. Every bad *modus* would be a good composition real if the land-owners affected to convey the tithes as well as the lands. Many cases have occurred in which very ancient and very uniform payments have been set aside upon clear documentary evidence, that, after the time of memory, and before the time of *Elizabeth*, tithes had been rendered. I cannot doubt, that, in many of those cases, the deeds of the land-owners conveyed the tithes as well as the lands. But the parties never appear to have taken this view of the case. I incline much to believe, that no tithes have been rendered for this parish from the time of the *Edwards*; and it is with great reluctance, I find myself compelled, in obedience to authority, to disregard this defence. I proceed upon the ground, that there is no evidence which shews this practice of non-render to have originated in any deed. I look no further into the case. Perhaps, the state of the law as to this species of property is much to be regretted, but it cannot be corrected in this inferior jurisdiction. That must be left either to the supreme judicature, or to the legislature. If I had thought myself in a situation to examine the whole circumstances of the evidence from whence the presumption is to be drawn, I should have many observations to make.

On the one side, the verdict would not have escaped me; and, on the other, the acknowledged fact, that no payment of the supposed compensation for the tithes, viz. the 10s., appears ever to have been made. I must

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Decree for the plaintiff.

BEFORE THE LORD CHIEF BARON AND MR. BARON VAUGHAN.

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Dec. 10th.
1830.
Feb. 1st.

STATHAM v. The Trustees of the LIVERPOOL DOCKS.

BY an indenture of lease, dated the 29th of September, 1773, and made between the Right Honourable *Charles William*, then Earl of *Seston*, of the one part; and *Charles Roe*, of *Macclesfield*, in the county of *Chester*, merchant, of the other part; in consideration of the rents, gross sums, or fines thereafter reserved, and of the covenants and agreements thereafter contained, the said *Charles William*, Earl of *Seston*, demised to the said *Charles Roe*, his executors, administrators, and assigns, the four several plots, pieces, or parcels of land, in the map or plan there-to annexed, described, and distinguished by, and called respectively, Lots 25, 26, 27, and 28; To hold the said several plots, pieces, or parcels of land, with the liberties and privileges therein mentioned, and every part and parcel thereof, (except as therein excepted and reserved), unto the said *Charles Roe*, his executors, administrators, and assigns, for and during, and unto the

Lease to *A.*, for a term of years, at a yearly rent, and under and subject to the payment, at stipulated periods during the term, of certain sums of money in the nature of fines, with a covenant on the part of the lessor, at the end of the term, on due and punctual payment being made of the rent, and gross sums or fines, at the times appointed for payment thereof, to grant a further or renewed lease.—*A.* assigned to *B.* a part of the premises, for the same term and

interest as *A.* himself took under the lease, subject to the payment of a proportional part of the rent and gross sums or fines, (the amount of the proportion was not specified). *C.* afterwards purchased of the lessor the reversion of the premises, expectant on the lease to *A.*, and, subsequently to acquiring the reversion, purchased *A.*'s interest in all the premises demised to *A.* by the lease, and not assigned by him to *B.* After this purchase by *C.*, one of the gross sums or fines became due, but was not paid, and no proportion of it was demanded by *C.* from, or was paid by *B.*—*Held*, that the double character filled by *A.* relieved *B.* from the strict performance of the covenant, and that the non-payment by *B.* of a proportion of the gross sum or fine was not, under the circumstances, a refusal to pay, or such a breach of the covenant, as to deprive *B.* of his claim to a renewed lease of the property assigned to him. And a demurrer for want of equity was over-ruled.

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full end and term of eighty years, without impeachment of or for any manner of waste, save as thereafter mentioned; yielding and paying, therefore, yearly and every year, during the said term, unto the said *Charles William*, Earl of *Seflon*, his heirs and assigns, the yearly rent or sum of 65*l.*, upon the 29th day of *September*, without any deduction or abatement whatsoever, although the same should not be demanded; the first payment thereof to begin and be made upon the 29th day of *September* then next ensuing; also, yielding and paying unto the said *Charles William*, Earl of *Seflon*, his heirs and assigns, yearly and every year, during the said demised term, upon the said 29th day of *September*, such sum and sums of like lawful money as should amount unto and be a reasonable recompense and satisfaction for all such trespass, damage, or loss, which should or might, in the last preceding year, be done, committed, or sustained, for or by reason of the exercise or enjoyment of the liberty, power, or authority therein before granted, of digging for, getting, taking, carting, and carrying away stone, in, upon, out of, over, through, and from the closes or parcels of land therein mentioned, or in consequence thereof, or any way relating thereto, and without any deduction or abatement thereout, as aforesaid; and also, yielding and paying unto the said *Charles William*, Earl of *Seflon*, his heirs and assigns, during the said demised term, over and above the said yearly reserved rent of 65*l.*, and such sums of money as were reserved and should become due for trespass, damage, and loss, as aforesaid, the several gross sums, fines, or rents therein after mentioned, upon the several days therein after mentioned, (that is to say), the sum of 130*l.* upon the 29th day of *September*, 1793, (which would be at the expiration of the first twenty years of the said demised term of eighty years); the further sum of 260*l.* upon the 29th day of *September*, 1813, (which would be at the expiration of forty years of the same term); the further sum of 520*l.* upon the 29th day of *September*, 1833, (which would be

at the expiration of sixty years of the same term); and the further sum of 1040*l.* upon the 25th day of *March* next before the end or expiration of the said demised term of eighty years, (and which would be in the year 1853); and without any deduction or abatement out of such gross sums, fines, or rents, or any of them, as aforesaid, although the same or any of them should not be demanded. And the said *Charles Roe*, for himself, his heirs, executors, and administrators, did thereby (among other things) covenant, promise, and agree to and with the said *Charles William*, Earl of *Sesfon*, his heirs and assigns, that he the said *Charles Roe*, his executors, administrators, and assigns, or some of them, should and would well and truly pay, or cause to be paid, unto the said *Charles William*, Earl of *Sesfon*, his heirs and assigns, not only the clear yearly sum of 65*l.*, but also the said several gross sums or rents of 130*l.*, 260*l.*, 520*l.*, and 1040*l.*, and also such yearly sums of money as should amount unto and be a reasonable recompense and satisfaction for all such trespass, damage, and loss which should or might be done, committed, or sustained for or by reason of the exercise or enjoyment of the said liberty or privilege, power or authority of digging for, getting, taking, carting, and carrying away of stone, or in consequence thereof, or any ways relating thereto, upon such several days, and in such manner as the same were thereinbefore respectively reserved and appointed to be paid, without any deduction or abatement whatsoever. And (among other covenants therein contained) the said *Charles William*, Earl of *Sesfon*, for himself, his heirs, executors, administrators, and assigns, thereby covenanted that, in case all and every of the rents, gross sums of money, covenants, and agreements thereinbefore reserved and contained, and which, on the part and behalf of the said *Charles Roe*, his executors, administrators, and assigns, were or was covenanted or agreed to be yielded, paid, done, observed, performed, fulfilled, and kept, should be in all respects fully yielded, paid, done, observ-

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ed, performed, fulfilled, and kept, at and upon the expiration of the said term of eighty years, but not otherwise, he the said *Charles William*, Earl of *Sefton*, his heirs or assigns, should and would, within the space of one calendar month next after the expiration of the said term of eighty years, upon the reasonable request, and at the proper costs and charges of the said *Charles Roe*, his executors, administrators, and assigns, or any of them, make, seal, and deliver, or cause to be made, sealed, and delivered, a good and sufficient lease unto the said *Charles Roe*, his executors, administrators, and assigns, of all and singular the said thereby demised plots, pieces, or parcels of land; and all and every the houses, outhouses, warehouses, yards, locks, wharfs, quays, and other works which should have then been erected, built, or made thereon, with the privileges and appurtenances thereof; save and except the liberty, privilege, power, and authority of entering into the closes or parcels of land therein mentioned, for the purpose of getting stone: To hold the same unto the said *Charles Roe*, his heirs and assigns, for the term of three lives, to be by them for that purpose named, within the space of the same calendar month, and for the life of the survivor of them; and to hold the same unto the said *Charles Roe*, his executors, administrators, and assigns, for the further term of twenty-one years, to commence from the day of the decease of the survivor of the said three lives, and fully to be complete and ended, under the said clear yearly reserved rent of 65*l.*, and with such covenant for payment thereof, and such other covenants and agreements, conditions, and exceptions, to be contained therein, on the part and behalf of the lessee or lessees who should be named therein, their heirs, executors, administrators, and assigns, as were contained in the now reciting indenture, or as near thereto as the circumstances and nature of the case would admit.

Charles Roe, under and by virtue of the lease, entered into the possession of the premises, and he continued in

possession to the time of his death. He died in the year 1782, intestate. Exch. Ch. in Eq.
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By an indenture, dated the 7th *March*, 1783, made between *William Roe*, as the administrator of the goods and chattels, rights, and credits, of the said *Charles Roe*, of the one part; and *Edward Bate*, of *Liverpool*, flour factor, and *George Jackson*, of *Liverpool*, miller, of the other part; for the considerations therein expressed, *William Roe*, bargained, sold, assigned, and transferred to *Edward Bate* and *George Jackson*, all and singular the piece and parcel of land and premises in the first mentioned indenture of lease described as Lot 28, and all his estate, right, title, and interest therein; To hold the same unto *Edward Bate* and *George Jackson*, their executors, administrators, and assigns, for the residue of the said term of eighty years, and all such further term as *William Roe* was entitled to, under and by virtue of the said indenture of lease, subject to the payment to the said *Charles William*, Earl of *Seflon*, his heirs and assigns, of a proportionable part of the said yearly rent of 65*l.*, on every 29th day of *September*, and also subject to the payment of a proportionable part of the several other rents or sums therein mentioned, and to the performance of the covenants and agreements in the said recited indenture of lease reserved and contained.

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By divers mesne assignments and assurances, and ultimately by indenture, dated the 26th *October*, 1815, the said piece or parcel of land and premises, described in the said lease as Lot 28, became, in the month of *October*, 1815, assigned to, and vested in, the plaintiff, for the residue and remainder of the said term of eighty years.

By an indenture of lease, dated the 31st *December*, 1815, and made between the Right Honourable *William Philip*, then Earl of *Seflon*, of the one part; and the plaintiff of the other part; for the considerations therein expressed, the said *William Philip*, Earl of *Seflon*, demised and leased unto the plaintiff, his executors, administra-

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to, and assigns, a certain plot, piece, or parcel of land, therein mentioned and described, for and during the term of the natural lives of the three persons therein named, and for the lives and life of the survivors and survivor of them, and for the further term of twenty-one years next after such survivor's decease, at the yearly rent of 5*l.*, payable in the manner and on the days and times therein mentioned and appointed for payment thereof.

In 1804, the mayor, bailiffs, and burgesses of the borough of Liverpool, purchased of the Earl of Sefton the reversion or remainder expectant on the determination of the said lease of the 29th September, 1778, and the term and interest thereby granted, of and in all and singular the plots, pieces, or parcels of land and premises, granted and demised by the said lease of the 29th September, 1778, and of and in the rents or gross sums of money, and the arrears thereof, by the said indenture of lease reserved and made payable. And in or about this year 1810, the mayor, bailiffs, and burgesses of Liverpool purchased from William Roe all and singular the pieces or parcels of land and premises comprised in the said lease of the 29th September, 1778, and not assigned by the said William Roe to the said Edward Bates and George Johnson, by the said indenture of the 7th March, 1783, and all the estate, right, and interest of the said William Roe, of and in the same premises; and the same were duly conveyed, and assigned to the said mayor, bailiffs, and burgesses accordingly.

One hundred and thirty pounds, the amount of the first of the fines, gross sums, or rents, payable under and by virtue of the said lease, became due and payable on the 29th September, 1793, before the purchase by the mayor, bailiffs, and burgesses, and the same was paid by the parties to the Earl of Sefton. Two hundred and sixty pounds, being the second of the said fines, became due and payable on the 29th September, 1818, after the purchase by the mayor, bailiffs, and burgesses.

By an act of Parliament, passed in the 8th year of Queen Anne, intituled "An Act for making a convenient dock or basin at *Liverpool*, for the security of all ships trading to and from the port of *Liverpool*," the trustees of the *Liverpool Docks* were incorporated. And, by an act of Parliament passed in the 6th year of Geo. 4, intituled "An Act for the further improvement of the port, harbour, and town of *Liverpool*, and altering, extending, and amending the several acts relating thereto," various powers were given to the trustees, for purchasing lands for the purposes of the act, for assessing the value by a jury, and, in case of dispute, for paying the money into the Court of *Exchequer*. In a schedule annexed to the last-mentioned act of Parliament, the pieces or parcels of land and premises before mentioned were respectively described.

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In 1827, the trustees of the *Liverpool Docks*, in pursuance of the said acts of Parliament, purchased of the mayor, bailiffs, and burgesses of *Liverpool*, all their estate, right, and interest in the premises; and, after such purchase, and in the same year, the trustees of the *Liverpool Docks* became desirous to purchase the estate and interest of the plaintiff in the piece or parcel of land, Lot 26, granted and demised by the lease of 29th September, 1773, and of and in the piece or parcel of land and premises granted and demised to the plaintiff by the lease of the 31st December, 1815; and the plaintiff and the trustees being unable to agree upon the price to be paid for the same, the trustees caused a jury to be summoned, in the manner directed by the act, and an inquiry took place on the 15th of June, 1827, and, by an adjournment, on the following day; and, on such inquiry, a question arose between the trustees of the *Liverpool Docks* and the plaintiff—Whether the plaintiff was entitled to the benefit of the covenant for renewal contained in the lease of the 29th September, 1773, with respect to such part of the premises thereby demised as had been assigned to, and vested in, the plaintiff? And, with a view to save time, it was arrang-

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ed, that the value of the plaintiff's interest in the premises demised by the lease of the 29th *September*, 1773, should be assessed and valued with reference to both events, *vis.* Whether the plaintiff was, or whether he was not, entitled to the benefit of the covenant for renewal contained in the said last-mentioned lease. And, to meet the former case, the value of the residue of the said term of eighty years, namely twenty-six years and a half, with the addition of the further term of three lives and twenty-one years, to commence from the expiration of the said term of eighty years, granted by the said lease of the 29th *September*, 1773, was to be assessed; and, to meet the latter case, the value of the term of twenty-six years and a half, being the then residue of the said term of eighty years only, was to be assessed.

The jury, by their inquisition, dated the 16th day of *June*, 1827, assessed the value of the estate and interest of the plaintiff of and in the premises respectively, and awarded the recompense to be paid for the same in manner following, (that is to say), the sum of 49,400*l.* for the estate and interest of the plaintiff in the whole of the premises, as well those comprised in the lease of the 29th *September*, 1773, and assigned to him as aforesaid, as those comprised in and demised to him by the lease of the 31st *December*, 1815. But, if the plaintiff should be entitled to a renewed lease for three lives and twenty-one years in the premises described in the inquisition, (being such part of the premises demised by the lease of the 29th *September*, 1773, as had been assigned to and vested in the plaintiff), then, and in that case, at the sum of 61,672*l.*

The value of the premises demised by the lease of the 29th *September*, 1773, and so assigned to and vested in the plaintiff, was assessed and valued by the Jury in manner following, that is to say, without any right or benefit of renewal, at the sum of 28,838*l.*; and, with the right or benefit of renewal, at the sum of 41,110*l.*: the value of the said right or benefit of renewal being, therefore, assessed and valued at

the sum of 12,272*l*. The value of the plaintiff's interest in the premises demised to the plaintiff, by the said indenture of lease of the 31st *December*, 1815, was assessed by the Jury at the sum of 20,562*l*.; but with respect to which no right of renewal subsisted, nor did any question, difference, or dispute in respect thereto exist between the trustees and the plaintiff.

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The trustees of the *Liverpool Docks*, immediately after the verdict, entered into the possession of the whole of the premises.

The bill, which was filed for a specific performance of the contract, charged, that the plaintiff was entitled to the benefit of the covenant for renewal, with respect to the premises comprised in the lease of the 29th *September*, 1773, and so assigned to and vested in him; and that although no part of the fine or sum of 260*l*. was in fact paid by the plaintiff or the persons under whom he claimed title, nor had any rent in respect of the premises been paid since the purchase by the mayor, bailiffs, and burgesses of *Liverpool*, yet, that the non-payment thereof had not arisen through the neglect or default of the plaintiff and the persons under whom he derived title, to pay the same, but from the omission or neglect of the mayor, bailiffs, and burgesses, under whom the trustees of the *Liverpool Docks* claimed, to call for, or require payment of any part of the fine or gross sum, or of the rents; and which proportionable part of the fine or of the rents was never in any manner ascertained or fixed: and that the non-payment of a proportionable part of the fines or rents was not, therefore, in equity, or even at law, any forfeiture or waiver of the benefit of the said covenant for renewal, particularly as the plaintiff, by his bill, offered to pay to the trustees of the *Liverpool Docks* a proportionable share of their-rears, if the Court should so direct.

The bill further charged, that if the lease of the 29th *September*, 1773, had remained vested in the said *William Roe*, or the mayor, bailiffs, and burgesses of *Liverpool*;

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and the mayor, bailiffs, and burgesses had not purchased the reversion of the premises, but had obtained a renewed lease of the premises, according to the covenants for renewal contained in the lease of the 29th September, 1773; the plaintiff would have been entitled, at any time before such renewal, on payment of a proportionable part of the fines and rents, to have had the benefit of the renewal with respect to the premises so assigned to and vested in him. And that the mayor, bailiffs, and burgesses of *Liverpool* could not, by purchasing the reversion of the said premises, defeat the right of the plaintiff to a renewal of the lease of the 29th September, 1773, so far as respected the premises therein comprised, and so assigned to and vested in him.

The bill further charged, that the trustees of the *Liverpool Docks* persisted in retaining the possession of the premises, as the purchasers and owners thereof, but refused to pay the amount of the purchase-money to the plaintiff, or into the Bank in the name of the Accountant-General of this Court, in pursuance of the act; and that the trustees had opposed an application made by the plaintiff for a *mandamus* to compel them to pay the purchase-money into the Bank in the name of the Accountant-General of this Court, and which application was therefore dismissed, on the ground that the Court had no jurisdiction to compel such payment. To this bill the defendants put in a general demurrer, for want of equity.

Mr. *Fonblanque* and Mr. *Wilbraham* in support of the demurrer.—The plaintiff has forfeited his right to the renewal by not paying his proportion of the gross fines or sums of money which were to be paid at the times stipulated by the original lease. That no part of the fines, nor any rent, has been paid by the plaintiff, or the persons under whom he claims title since the purchase by the Corporation of *Liverpool*, is admitted; and the plaintiff endeavours to excuse the non-payment, by alleging that no part of the said fines or gross sums, or of the rents, has

at any time been demanded. The forfeiture, however, was equally the same. A time having been fixed by the original lease for the payment of the gross fines and of the rents, the non-payment at that time, though not demanded, was tantamount to a refusal to pay. *Bracebridge v. Buckley* (a). In the discussion in that case, Lord Chief Baron Thomson expressly states—"If a man covenant to do an act within a certain time, no demand is necessary; and a neglect of performance is tantamount to a refusal in law (b)." In *Bogley v. The Corporation of Leominster*, under a lease for three lives, with a covenant to renew on certain terms when one life should drop, the lessee, having suffered two lives to drop, was held not entitled to a performance of the covenant for renewal; and in deciding that case, the Lord Chancellor said, it had been so determined, over and over again, in the House of Lords, upon *Irish* cases. If the plaintiff, or the person under whom he derives title, had desired the benefit of the covenant, they should have strictly performed the condition on which the renewal was to be granted. They ought to have required the Corporation to take some measures for fixing the amount of the proportions of the fines and rents to be paid by the plaintiff, and those under whom he claims; but no such application was ever made to the Corporation. The plaintiff in this case does not stand in the situation of an under-lessee, but of an assignee. The covenant by the original lessor was to grant one renewed lease of the premises to the lessee, his executors, administrators, or assigns; and *Roe*, the administrator of the lessee, having assigned a part of the premises for all the term and interest granted by the lease, the covenant is gone, at law, for the lessor could not be called upon to grant more than one lease to the lessee, or his representatives; whilst the lessee, having parted with a portion of the property, could not be in a situation to take a renewed lease of the whole of the

Each CD is Bp
1830.

STATUTE

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(a) 2 Price, 206.

(b) Ibid. 213.

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premises. The covenant being gone at law, equity will not give effect to it.

Mr. *Spence*, for the bill.—The persons who now say that this covenant cannot be performed, are the very persons who, by their own acts, have placed us in this situation. It would be most unjust if the Corporation were allowed to relieve themselves from the covenant to renew by purchasing the reversion, and so destroying the original lease. The Corporation stood in the place of *Roe*, from whom they took an assignment, with notice of the assignment to *Bate* and *Jackson*.

Feb. 1st.

The LORD CHIEF BARON now delivered the judgment of the Court:—

This demurrer was argued before Baron *Vaughan* and myself, and I am authorized to say, that Baron *Vaughan* is of the same opinion with myself as to the result, and for the same reasons. We have not been furnished with a copy of the demurrer, but we presume it to be a general demurrer for want of equity. The bill prays a specific performance of the contract mentioned in the pleadings, and a declaration that the plaintiff is entitled to be paid the sum of 61,672*l.*, the amount assessed as the value of the plaintiff's interest in the property.

The question is, whether the plaintiff is entitled to be paid the sum of 61,672*l.*, the amount assessed as the value of his interest, supposing him to be entitled to the benefit of the covenant for renewal, or the sum of 41,110*l.*, the amount assessed, on the supposition that he is not entitled to the benefit of that covenant. The whole case turns on this.

The first instrument stated in the bill is a demise by Earl *Sefton* to *Charles Roe* for eighty years, from 29th September, 1778. [*His Lordship stated the terms of that demise.*] *Charles Roe* died in 1778; *William Roe* was his administrator. On the 7th March, 1783, *William Roe*, by an

indenture, assigned to *Bate* and *Jackson* part of the land described as Lot 28, for the residue of the term of eighty years, and such further term as *Roe* was entitled to, subject to the payment of a proportionate part of the rent, and of the sums to be paid for fines. It is to be observed, that in this instrument no specific sum is mentioned as the proportion to be paid. No sum being mentioned, nor any rate of proportion stated, one can only suppose that it was to be calculated according to the relative values of the property. It is, however, for the purposes of this case, sufficient to state, that the plaintiff is the assignee of *Bate* and *Jackson*, and entitled to all their rights and privileges, and bound by all the covenants entered into by them. In 1809, as stated in the bill, but as it is to be collected from the deeds, in 1804, but which is immaterial, the Mayor and Corporation purchased of the Earl of *Sefton* the reversion in the premises, subject to the lease, together with all rents, rights, &c., and of course the rent and the fines reserved by the lease of *September*, 1773; and if all the stipulations contained in that lease had been complied with, they would have been bound to grant the further lease. Now, the first instalment of 180*l.* was paid, but I take it as a fact that no part of the subsequent instalments have ever been paid. After the purchase of the reversion, the same Corporation purchased from *Roe* all the premises comprised in the lease which had not been assigned to *Bate* and *Jackson*. They therefore stood in the double character of lessor and lessee; on the one hand, bound by the obligations entered into by Lord *Sefton*, and, on the other hand, entitled to all the benefits to which that nobleman was entitled under the lease. They were, therefore, entitled to receive all the sums of money payable as fines, and were bound by all the covenants contained in the lease. The question is—Whether the amount assessed by the Jury to be paid to the plaintiff for his interest ought to be computed on the assumed ground of his being entitled to the benefit of the covenant for renewal or not?

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The objection stated in the argument against his right to the benefit of the covenant for renewal is, that these fines or gross sums have not been paid, and particularly, that no part of the fine due in 1813 has been paid, and that there is no covenant or obligation on the part of the lessor to renew, except on the strict and literal performance of the covenant for payment of the rents and fines.

The view which Baron *Vaughan* and myself have taken of this case is, that the double character represented by the Corporation, both of lessor and lessee, will relieve the persons claiming under *Bate* and *Jackson* from the strict performance of this obligation. And we think, on looking at the assignment from *Roe* to *Bate* and *Jackson*, that, as between them, it rested in covenant. To be sure, under the covenant, the land was charged with a proportion of the fines; what proportion, however, is not stated, but rests on the covenant. If the property had remained in the hands of *Roe*, it would have been his duty to have paid the whole of the fines or gross sums, and to have called on *Bate* and *Jackson*, or their assignees, for payment of their proportion. Whatever may be the strict rule of a Court of law with respect to this as a condition, is immaterial; we have only to consider this case in equity. And we think it would be the greatest injustice to allow the Corporation to take advantage of their own wrong; and our opinion therefore is, that the plaintiff is entitled to the largest sum, and that the demurrer must be over-ruled.

Demurrer over-ruled, with costs.

END OF HILARY TERM AND SITTINGS AFTER.

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1. An affidavit made by a defendant, in a suit in this Court, sworn before a magistrate in Scotland, permitted to be read. *Edinburgh Sinclair and Others*, Page 273

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ANNUITY.

1. *A.*, by two several deeds granted to *B.* two annuities, charged on certain estates, of which *A.* was ten-

ant for life, and further secured by a warrant of attorney, and an insurance on the life of *A.*, and memorials of these annuities were duly enrolled. Afterwards, by deed, *A.* granted another annuity to *B.*, charged upon the same estates, and also upon another estate to which *A.* was likewise entitled, and by a further insurance on *A.*'s life. By this deed, *A.* also charged the two former annuities upon the last-mentioned estate. And he conveyed his interest in all the estates to a trustee, in trust, for securing the three annuities. The three annuities were further secured by a covenant in this deed, on the part of the grantor to authorize and permit his deputy, in an office held by him, to pay a yearly sum to the trustee towards the annuities; and by a covenant for payment of extra premiums of insurance. A memorial of the grant of the last-mentioned annuity was enrolled, but no further or additional memorial was enrolled as to the two first-mentioned annuities with regard to the charge of them on the additional estate, and the additional securities for them contained in the last-mentioned deed: nor in the memorial, enrolled of the third annuity, was any notice taken of the additional securities for the two first annuities:—*Held*, that it was not necessary, under the annuity-act, to enrol any memorial of the further or collateral securities for the two first annuities. *Thomas Aston and Philip Hurd*, Plaintiffs; *Charles Gwinnell*, and *John Askew*, Defendants, 136

2. Where, on the grant of an annuity, the consideration-money was, with the assent of the grantor, paid to a trustee to be applied by him in payment of the costs of the annuity deeds, afterwards of certain debts due from the grantor to judgment creditors, and the surplus to the grantor:—*Held*, that this was not a retainer within the meaning of the statute, so

as to render the annuity void, notwithstanding the trustee was the partner of the grantee, and both of them were the solicitors employed in the transaction. *Ibid.*

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ASSISTANT OVERSEER.

See PLEADING, (LAW & REVENUE), 4.

1. An assistant overseer, appointed under the statute 59 *Geo.* 3, c. 12, is within the statute 17 *Geo.* 2, c. 3, and liable to a penalty for not producing the rate to an inhabitant when lawfully demanded, if, by his appointment, he be authorized to take care of the poor, or have a limited authority to have the legal custody of the rate. *Edwards v. Bennett*, 458

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VENDOR AND PURCHASER.

1. In taking an account of the pecuniary transactions between a client and his attorney, the latter also filling other confidential situations, the production of a bond executed by the client to the solicitor is not alone sufficient evidence of a debt to that amount, but the obligee or his repre-

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sentatives are bound to prove the actual payment of the money secured by the bond. *Lewes v. Morgan*, 230

2. An attorney's bill, for business in bankruptcy, need not be delivered one month before action brought, pursuant to the stat. 2 *Geo.* 2, c. 23, s. 23. *Crowder and Another v. Davies and Others*, 433.

3. It is not requisite, that a bill for business in bankruptcy should be taxed under the stat. 6 *Geo.* 4, c. 16, s. 14, before the commencement of an action. *Ibid.*

4. Attending upon, and concerting measures with, the attorney of the opposing creditor, to resist the discharge of an insolvent, is not such business as will render it incumbent upon an attorney to deliver his bill one month before the commencement of an action, pursuant to the stat. 2 *Geo.* 2, c. 23. *Ibid.*

AUCTION.

See AUCTION DUTY.

1. The employment of a puffer at a sale by auction of property seized under an extent, by an agent of the Crown, to whom a bidding is reserved by the conditions of sale, vitiates the sale. *Rex v. Marsh*, (upon an Extent), 331

2. The misconduct of the purchaser does not preclude him from objecting to the employment of a puffer at a sale by auction. *Ibid.*

AUCTION DUTY.

1. *Quære*, Whether a sale by auction by the assignees of the absolute interest in fee of an estate of the bankrupt in mortgage, is or is not liable to the auction duty. *The King v. Winstanley*, 126

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BANKRUPT.

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AUCTION DUTY.

1. The act of bankruptcy by lying in prison twenty-one days under the statute 6 *Geo.* 4, c. 16, s. 5, does not relate to the time of the arrest. *Higgins, Assignee of Cartmell; a Bankrupt, v. M'Adam*, 1

2. The twenty-one days during which a trader must lie in prison to constitute an act of bankruptcy under the statute 6 *Geo.* 4, c. 16, s. 5, are reckoned inclusively. *Ibid.*

3. A plaintiff in execution upon a judgment by confession ceases to be a creditor having security for his debt within the statute 6 *Geo.* 4, c. 16, s. 108, when the goods seized under that execution are sold, even though an act of bankruptcy be committed before the return of the writ. *Ibid.*

4. The acts of a special bailiff appointed by a plaintiff in execution, who indemnifies the Sheriff, are equivalent to the acts of the plaintiff himself; and therefore, where a plaintiff in execution upon a judgment by confession, appointed a special bailiff who seized and sold goods during two days, for part of which he received the money, and for the rest gave credit, before an act of bankruptcy was committed by the defendant—It was held, that the plaintiff was entitled to retain the proceeds of those sales against the assignees, although the *fi. fa.* was not returnable before the act of bankruptcy. *Ibid.*

5. Commissioners of bankrupt have no authority to commit a witness for refusing to read an entry in a book. *Ex parte Isaac, In re Owen, a Bankrupt*, 38

6. A witness summoned by commissioners, under the statute 6 *Geo.*

4, c. 16, s. 33, being required to read certain entries in a book, to which, during his examination, he had referred, but which he had not been called upon to produce, refused to read the entries, whereupon he was committed for refusing to answer the "said question:"—*Held*, that the warrant was bad in substance, and in form; a request to read not being a question. *Ibid.*

7. The warrant of commitment of a bankrupt for not signing his examination, need not set out the examination. *Vaughan B. dissentiente.*—*In re T. Leak*, 46

8. A warrant of commitment of a bankrupt for not signing an examination concluded by committing him, until he should full answers make to the satisfaction of the commissioners, and sign and subscribe his examination:—*Held*, that the conclusion was informal, but not defective in substance. *Ibid.*

9. Demurrer to bill by assignees of a bankrupt, on the ground that it did not state the suit to be instituted with such consent of the creditors or of the commissioners, as required by the statute 6 Geo. 4, c. 16, overruled. *Jones v. Yates*, 373

BEER.

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BEQUEST.

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LEGACY DUTY.

BILL.

See **PRACTICE, (EQUITY), 1, 6, 14, 18.**

BILLS AND NOTES.

1. A bill of exchange, payable to order, was indorsed by the payee to *A.*, who indorsed it as follows: "pay to *B.* or his order for my use;" *B.* applied to his bankers to discount the bill, and they *bond fide*, but not with-

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out making inquiry, did so:—*Held*, that the indorsement was restrictive; that *B.* was a trustee for *A.*, and could confer no greater interest to his indorsee, against whom *A.* was entitled to recover. *Lloyd and Others v. Sigourney*, 220

BILL OF COSTS.

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PRACTICE, (EQUITY), 13.

CHAMPERTY.

1. By articles of agreement between the vendor and purchaser of an estate, it was agreed that the purchaser bearing the expense of certain suit, commenced by the vendor against an occupier for by-gone rent, should have the rent so to be recovered, and also any sum that could be recovered for dilapidations, and that the purchaser, at his expense, might use the name of the vendor in any action he might think fit to commence against the occupier, for arrears of rent, or dilapidations:—*Held*, that the agreement was not void, as amounting to champerty. *Williams v. Protheroe*, 129

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COMPETENCY.

COAL ACT.

1. The coal act, 47 Geo. 3, c. 68, s. 116, enacts, that if a purchaser be dissatisfied with the measure of his coals, he shall send a notice to the office of the principal Land Coal Meter, whereupon a meter, within the space of two hours next after such notice left at the office, shall "attend from the office at the house of the purchaser," to remeasure the coals; and sect. 120, imposes a penalty upon the principal meter, if he shall "neglect or refuse within the space of two hours after the receipt of the notice, to send a meter to the house of the purchaser."—*Held*, that these two sections must be read together, and that it is sufficient to satisfy the words of the 117th sect. if the meter leave the office within two hours after the receipt of the notice, and proceed with due diligence to the house of the purchaser, although he do not arrive there within that time. *Loader, qu tam, v. Thomas*, 525.

CODICIL.

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COMMISSIONERS OF BANKRUPT.

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COMMISSIONERS OF SEWERS.

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COMMITMENT.

See BANKRUPT, 5, 6, 7, 8.

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See PLEADING, (LAW & REVENUE), 1, 2.
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COMPETENCY.

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COMPOSITION.

See FRAUDULENT AGREEMENT.
TITHES, 5.

CONCESSIT SOLVERE.

1. The action by *concessitolvere* in *Wales*, cannot be commenced by notice, but only by original. *Phillips, Administratrix, v. Williams*, 207

2. Where an attorney in *Wales* delivered a notice, that an action had been commenced, to a bailiff, to be served upon the defendant, who afterwards, and before the notice was served, paid the plaintiff his debt; and the attorney afterwards proceeded by *concessitolvere*, to recover the costs:—*Held*, that the notice did not operate as the legal commencement of the action, and that the payment was in time. *Ibid*.

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PRACTICE (EQUITY), 18.

CORPORATOR.

See EVIDENCE, 1.

COSTS.

See ATTORNEY AND CLIENT, 2, 3, 4.
PRACTICE, (EQUITY), 9, 13, 15.

1. Where no money has been advanced by the client, the Court will not allow costs to an individual conducting the cause, who has been struck off the roll of the Courts of *King's Bench* and *Common Pleas*, and, by omitting to take out his certificate as such, is incapacitated from practising as a solicitor of the Court of *Chancery*. *Young v. Dowlman*, 24

2. On the hearing of a cause, the bill was dismissed with costs as against the defendants, such costs to be taxed, and, when taxed, to be paid by the plaintiffs. Before the costs were taxed one of the plaintiffs died: the Master proceeded with the taxation, and made his certificate, notwithstanding the surviving plaintiffs objected to the taxation, on the ground that the suit was abated. On an application to quash the certificate, the Court held that the proceedings were regular. *Meredyth and two Others v. Hughes and Others*, 188

3. A certificate, that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under the stat. 7 Jac. 1, c. 5, need not be granted immediately after the trial of the cause. *Norman v. Danger and Another*, 203

4. Where the plaintiff is nonsuited, the Judge before whom the cause was tried, may, after an interval of four years, upon an affidavit that the defendant was within the provisions of the stat. 7 Jac. 1, c. 5, grant a certificate to entitle him to double costs.

Ibid.

DEFAMATION.

5. Where copies of deeds or other papers are furnished by either party to the Judge of the Court, the party is not entitled to the costs of such copies as against the other side, but they are merely personal costs, to be sustained by the party furnishing them, unless there be a fund in Court; this being in accordance with the practice in the Court of *Chancery*. *Bozon v. Williams*. 378

6. Where the plaintiff obtained a verdict, and the Court of *Exchequer* arrested the judgment, which judgment was reversed by the Court of *Exchequer Chamber*:—*Held*, that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the Court of *Exchequer*. *Adams v. Meredith*, 419

DAMAGES.

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DEATH.

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FRAUDULENT AGREEMENT.
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DEVISE.

DEMURRER.

See **BANKRUPT**, 9.
LANDLORD & TENANT, 2.

DEPOSIT.

See **ATTORNEY AND CLIENT**, 1.
MORTGAGE.
VENDOR AND PURCHASER.

DESCENT.

1. Devise to trustees and their heirs, during the life of *M. P.*, in trust, to lay out the rents, &c., on government securities, to accumulate until she shall attain twenty-one, and from and after she shall attain that age, to suffer her to receive and take the rents, issues, and profits during her life, not subject to the control of any husband with whom she may intermarry; her receipt to be a sufficient discharge for the same; and from and after the decease of *M. P.*, to the heirs of the said *M. P.*, for ever:—*Semble*, that the legal estate is vested in the trustees during the life of *M. P.*, and therefore, that there can be no union, under the rule in *Shelley's* case, of the legal estate in remainder to the heirs of *M. P.*, with the preceding estate for life, so as to give *M. P.* the fee. *Playford v. Hoare*, 175

2. *Semble*—That an estate for life, executed by the statute of uses, cannot unite with a legal remainder by the rules of the common law. *Ibid.*

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See **DESCENT**.
JOINT TENANTS.
PRACTICE, (EQUITY), 9.
WILL.

1. A testatrix devised certain estates to trustees for a term of five hundred years, and, subject to the term, and the trusts thereof thereafter declared, she devised the same estates to the use of various persons successive-

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ly for life; with remainder to the first and other sons of such several persons successively in tail male; with remainder to the daughters of such several persons, successively in tail general; with remainders over. The trusts of the five hundred years' term were declared to be, that the trustees of the term should, out of the rents and profits of the hereditaments comprised in the said term, pay the several annuities mentioned in the will, and, subject thereto, should, out of the residue of the rents and profits of the premises comprised in the said term, levy and raise such sums of money, not exceeding 8,000*l.* in the whole, as should be necessary to pay and satisfy such debts or sums of money as might be due and owing by her late husband, or by herself, either by mortgage, bond, or otherwise; and all which she directed the trustees to pay, satisfy; and discharge out of the said rents and profits, in such manner and form as they should think fit, and as soon as conveniently might be after her decease; and subject and without prejudice to the several trusts declared of the said term, upon trust to pay and apply the residue and overplus of the net rents, issues, and profits of the premises comprised in the said five hundred years' term, unto the person or persons who, for the time being, should be next entitled to the reversion or remainder of the premises, expectant on the said term, under the limitations thereinbefore contained:—*Held*, that it was a question of intention, to be collected from the provisions of the will, whether the testatrix meant to charge the debts upon the *corpus* of the estate, or only to direct the payment out of the *annual* rents and profits; and, upon the several provisions, the Court held, that the testatrix did not intend that the debts should be raised out of the *corpus* of the estate, but only that

the same should be discharged out of the annual rents and profits. *Heneage and Others v. Lord Andover and Others*, 360

2. Though, in favour of creditors, the Court considers a devise in trust for payment of debts out of rents and profits, to be equivalent to a devise of the estate itself in trust for payment of debts, and will direct the estate to be sold for that purpose; yet, it has been in cases where the remainderman was either tenant in fee or in tail, and, therefore, liable to pay the debts sooner or later. *Ibid.*

3. Devise to *A.* and *B.* and their heirs, to sell and dispose, at their discretion, of all the testator's right in *King's Sedgmoor*, belonging to the manor of *Moorlinch*, and all his right in *Moorlinch*, if an act should pass for inclosing the said moor within twenty years, and to pay the proceeds to the several persons therein mentioned. An inclosure act passed within the twenty years, and various allotments were made in respect of the testator's estates:—*Held*, that the devise was in the nature of an executory devise, to take effect on the passing of the act; and, that under the devise, the devisees took a quarter part of the money produced by the sale of the allotments in *King's Sedgmoor*, in respect of the manor of *Moorlinch*, and the whole of the proceeds of the sale of allotments in respect of lands in *Moorlinch*. *Robert Gardner v. Mary Lydden*, 389

4. Under a bequest of stock to *A.* for life, and after the decease of *A.*, to the testator's great grand-children, share and share alike, if they were living at the time of *A.*'s death, but, that they should not receive any part of the capital till they arrived at twenty-one. But if any one, or all of the said children should die before they arrived at the age of twenty-one years, the shares or part of those so dy-

ENDOWMENT.

ing should go to *B.* and *C.*, share and share alike:—*Held*, that the attaining twenty-one was not confined to the event of surviving *A.*, and, therefore, that on the decease of one of the children in the life-time of *A.* under twenty-one, the share of such child passed to *B.* and *C.*, and did not lapse so as to go to the testator's residuary legatee. *Goodchild v. Fenton*, 481

DISCOVERY.

See LANDLORD AND TENANT, 1.

DISMISSAL OF BILL.

See COSTS, 2.

PRACTICE, (EQUITY), 14.

DISTRESS.

1. *A.*, by indenture, demised to *B.* a certain wharf, adjoining the river *Thames*, described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the same belonging; it was found by a special verdict, that, by this indenture, the exclusive use of the land of the river *Thames*, opposite to, and in front of, the wharf, between high and low water-mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf; but, that the land itself, between high and low water-mark, was not demised:—*Held*, that barges of *B.*, lying between high and low water-mark, and attached to the wharf by ropes, could not be distrained for rent of the demised premises, in arrear. *Capel and Another v. Bussard and Others, Assignees of Jones and Another, Bankrupts*, 344

ENDOWMENT.

See TITHES, 1.

EVIDENCE.

ENROLMENT.

See ANNUITY, 1.

EQUITABLE MORTGAGE.

See MORTGAGE.

ERROR.

See COSTS, 6.

• ESCHEAT.

See PRACTICE, (EQUITY), 18.

ESTATE.

See DESCENT.
DEVISE.

ESTOPPEL.

See EVIDENCE, 2.

PLEADING, (LAW & REVENUE), 8.

ESTREAT.

See PRACTICE, (LAW & REVENUE), 1, 2.

EVIDENCE.

See BANKRUPT, 5, 6.

PRACTICE, (EQUITY), 1, 3, 11, 12.
TITHES.

1. A member of a corporation is not a competent witness to sustain the claim of the corporation, even though he release his interest in the subject matter of the suit. *Doe d. Mayor and Burgesses of Stafford and Another, v. Tooth*, 19

2. An act of Parliament, 6 Geo. 4, c. xxx., to enable a company to form a rail-way, prescribed the form of action against the proprietors for calls, and enacted, that it should only be necessary to prove that the defendant was a proprietor, and that the calls had been made in pursuance of the act; it also recited, that a sum of money had been subscribed by the proprietors, under a contract binding their heirs: whereas, in fact, that sum had not been subscribed, and no contract under seal had been executed by the proprietors:—*Held*, that a defendant

EXTENT.

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who, with a knowledge of the mis-recital, had paid previous calls, and acted as a proprietor, was estopped from questioning the validity of the act, upon the ground of the mis-recital; and that it was not incumbent upon the plaintiffs to shew that the defendant had executed a contract under seal, in order to prove that he was a proprietor within the meaning of the act. *The Cromford and High Peak Rail-way Company, v. Lacey*, 80

EXAMINATION OF WITNESSES.

See PRACTICE, (EQUITY), 3, 12.

EXCEPTION TO MASTER'S REPORT.

See PRACTICE, (EQUITY), 7, 13.

EXCISE.

See EXTENT.

RETAIL BREWER.

EXECUTOR AND ADMINISTRATOR.

See LEGACY DUTY.

1. An executor who has assets sufficient for that purpose, is liable, upon an implied promise, to pay for a funeral suitable to the degree of his testator, furnished by the directions of a third person. *Rogers v. Price*, 28

2. Executor charged with interest on dividends of stock received by him, and kept at his banker's with his own money for a number of years, instead of being invested to accumulate. *Goodchild v. Fenton*, 481

EXECUTORY DEVISE.

See DEVISE, 3.

EXTENT.

1. Fixtures demised with a paper mill, and used by the tenant in the

manufacture of paper, are not liable to be seized under an extent for duties upon paper, owing by the tenant to the Crown, as utensils for the making of paper, in the custody of the tenant under the stat. 34 Geo. 3, c. 20, s. 27. *The Attorney-General v. Gibbs and others*, (upon an Extent), 333

FINE.

See LANDLORD & TENANT, 3.

PRACTICE, (EQUITY), 19.

PRACTICE, (LAW & REVENUE), 1, 2.

VOLUNTARY AGREEMENT, 2.

1. Where a fine is covenanted to be levied to certain uses, it is competent to the parties, whilst it is directory, to vary the uses, but the uses must be varied by all the parties, and by an instrument of as high a degree as the former, and the fine ought to be levied to the same conusee; and, therefore, where a fine covenanted to be levied to certain uses was omitted to be levied, and several years afterwards a fine was levied by the same conusors pursuant to a deed declaring other uses, and to a different conusee:—*Held*, that the fine operated to the uses of the latter deed, and not of the former. *Houghton and Others v. Tate and Others*, 486

FIXTURES.

See EXTENT.

FORFEITURE.

See EXTENT.

LANDLORD & TENANT, 3.

FRAUD.

See VOLUNTARY AGREEMENT.

FRAUDULENT AGREEMENT.

FRAUDULENT AGREEMENT.

See VOLUNTARY AGREEMENT.

1. A creditor, in respect of two demands, seized the goods of *B.* his debtor, under an execution for one of

INDORSEMENT.

the two debts, and afterwards, at a meeting of some of the creditors of *B.*, when a composition was proposed, declared that he would not agree to the composition, unless the debt for which the goods had been seized, were secured to him; *C.*, who was not a creditor, guaranteed the debt, and *A.* withdrew his execution, and signed the composition deed:—*Held*, that the bargain was a fraud upon the rest of the creditors, and void. *Coleman v. Waller*, 212

FUNERAL.

See EXECUTOR & ADMINISTRATOR, 1.

FURTHER CHARGE.

See ANNUITY, 1.

GUARANTEE.

See FRAUDULENT AGREEMENT.

HEIR.

See PRACTICE, (EQUITY), 9.

HIGHWAY.

See TURNPIKE.

HUSBAND AND WIFE.

See LEGACY DUTY, 4.

PRACTICE, (EQUITY), 19.

VOLUNTARY AGREEMENT, 2.

ILLEGAL AGREEMENT.

See FRAUDULENT AGREEMENT.

POLICY OF TRADE.

PRACTICE, (EQUITY), 2.

ILLEGAL CONSIDERATION.

See FRAUDULENT AGREEMENT.

PRACTICE, (EQUITY), 2.

IMPERTINENCE.

See PRACTICE, (EQUITY), 4.

INCLOSURE.

See WOOLMER FOREST.

INDORSEMENT.

See BILLS AND NOTES.

JUDGMENT.

INFANT.

See PRINCIPAL AND AGENT.

INNUENDO.

See LIBEL.

INJUNCTION.

See PRACTICE, (EQUITY), 5, 6, 16.

INSOLVENT COURT.

See ATTORNEY AND CLIENT, 4.

INTEREST.

See EVIDENCE, 1.

EXECUTOR & ADMINISTRATOR, 2.

LEGACY DUTY, 2, 3.

PRACTICE, (EQUITY), 17.

INTERROGATORIES.

See PRACTICE, (EQUITY), 12.

ISSUE.

See PRACTICE, (EQUITY), 8, 9, 15.

JOINT TENANT.

1. Where the residue of real and personal estates were devised by a testator to his two sons as joint tenants, and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the monies arising therefrom in one common stock, and with part of such monies purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, or ever accounted with each other:—It was held, under the circumstances, that they continued, at the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased estates. *Morris v. Barrett*, 384

JUDGMENT.

See PRACTICE, (EQUITY), 17.

RECOGNIZANCE, 1.

LANDLORD & TENANT. 589

LANDLORD & TENANT.

See DISTRESS.

EXTENT.

1. By an indenture, a farm and lands were demised to a tenant at a yearly rent, and also under and subject to certain yearly payments, in case the tenant should not crop, manure, and manage the farm, in manner therein specified and covenanted; and also in case the tenant, in the last three years of the term, should sow more than seventy acres of clover in one year, the additional rent of 10*l.* an acre for every acre above seventy acres, for the residue of the term:—*Held*, that the additional rents were in the nature of liquidated damages, and not of penalties; and therefore, on a bill filed by the landlord for a discovery of breaches of the covenants in aid of an action at law, a plea that the discovery might subject the tenant to penalties, was over-ruled. *Jones v. Green*, 298

2. In a lease, the lessor covenanted, at any time thereafter during the term, to cause any quantity of square oak wood to be set out within some part of the lands or grounds then belonging to the lessor, as should be wanted for the benefit of the lessee, and to be used in the buildings intended to be made on the demised premises; and the lessee covenanted to pay, and allow to the lessor, interest for the total amount or value thereof, after the rate of 4*l.* per cent. on the value, and so in proportion for a greater or less quantity. Bill by assignees of the lease for an account of what was due under that covenant, and for an injunction to restrain an action brought for a breach of it. A demurrer, for want of equity, was over-ruled. *Pearson and Others v. Houghton, Bart.* 413

3. Lease to *A.*, for a term of years, at a yearly rent, and under and sub-

ject to the payment, at stipulated periods during the term, of certain sums of money in the nature of fines,

purchased *A.*'s interest in all the premises demised to *A.* by the lease, and not assigned by him to *B.* After this purchase by *C.*, one of the gross sums or fines became due, but was not paid, and no proportion of it was demanded by *C.* from, or was paid by *B.*—*Held*, that the double character filled by *A.* relieved *B.* from the strict performance of the covenant, and that the non-payment by *B.* of a proportion of the gross sum or fine was not, under the circumstances, a refusal to pay, or such a breach of the covenant, as to deprive *B.* of his claim to a renewed lease of the property assigned to him. And a demurrer for want of equity was overruled. *Statham v. The Trustees of the Liverpool Docks*, 565

LEASE.

See LANDLORD & TENANT.

LEGACY.

See DEVISE, 4.

LEGACY DUTY.

LEGACY DUTY.

LEGACY DUTY.

1. The forgiveness of a bond debt by will is a legacy, and as such is liable to the payment of legacy duty. *The Attorney-General v. Holbrook and Another*, 114

2. But where a specific sum is bequeathed, or a specific debt forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt or sum of money, between the time of such death and the period when the executors close their accounts. *Ibid.*

3. The obliges of a bond, after the death of the principal therein, but during the life of the surety, who was his brother, made his will, containing the following directions relative to the bond:—"I hereby forgive the bond debt, both principal and interest, due to me, and entered into by *J. W.* and my brother *J. H.*, with and for him, for the said *J. W.*'s paying me the principal sum of 4000*l.* and interest, at 4*l.* per cent. *&c.*; and do order the said bond, as my decease, to be delivered up and cancelled." The interest upon the bond was paid up to the death of the testator, whom his brother survived:—*Held*, that this was a legacy whereon legacy duty was payable by *J. H.*, testator's brother, but upon the principal sum only, and not in respect of interest accruing subsequent to the testator's death. *Ibid.*

4. A bequest of a "residue, of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the testator's son and his wife, (a stranger in blood), for their lives, with remainder to the grandchildren of the testator, in equal proportions," is liable to legacy duty, to be calculated at the rate of 1*l.* per cent. for the son's moiety, and 10*l.* per cent. for that of the wife, upon the

LIMITATION OF ACTIONS.

principle that the son and his wife each take a life-interest in one moiety of the income of the residue. *Attorney-General v. Burnie*, 531

5. A bequest to the poor of the parish of A., of 50*l.* per annum, to be laid out at Christmas in bread, and distributed by the minister, &c., to the most needy objects in the parish, is liable to the legacy duty at the rate of 10*l.* per cent., payable upon the whole sum. In the Matter of the Charity of Joseph Franklin, 544

LESSOR & LESSEE.

See LANDLORD & TENANT.

LIBEL.

1. It is actionable, without the aid of prefatory averment in the declaration, to write of a magistrate, that, "as chairman of a finance committee, he audited accounts containing items of upwards of 12,000*l.* for the nominal purpose of furnishing lodgings, plate, &c. for the Judges; but which expenditure was in reality to find accommodation for the magistrates, as the Sheriff always found the Judges suitable lodgings, without putting the county to any expense." *Adams v. Meredith*, 219

LIEN.

See MORTGAGE.

VENDOR & PURCHASER, 2.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

1. A., who was entitled, by act of Parliament, to all the surplus water, and such as was not necessary for the purposes of a canal, brought an action against the Canal Company for an illegal abstraction of water, and alleged in his declaration continuing acts of commission and omission from an antecedent period, by which he was deprived of the water for nine weeks in the year 1825, and for seventeen

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weeks in the year 1826:—*Held*, that the Company were within the protection of the limitation clause of the statute 30 Geo. 3, c. 82, s. 79, which enacts that any action for any thing done in pursuance of the act, shall be brought within six calendar months next after the fact committed, unless there be a continuation of damage; and also, that there was no continuation of damage, inasmuch as there was a cessation of injury, although the cause from which the injury proceeded was continuing. *Blakemore v. The Glamorganshire Canal Company*, 60

2. *Quere*, Whether acts of omission would be within the limitation clause. *Ibid.*

LIQUIDATED DAMAGES.

See LANDLORD & TENANT, 1.

MASTER, REFERENCE TO.

See PRACTICE, (EQUITY), 4, 7, 11

MEMORANDA, 1, 307, 418, 518.

MEMORIAL.

See ANNUITY, 1.

METER.

See COAL ACT.

MIS-RECITAL.

See EVIDENCE, 2.

MODUS.

See TITHE, 2, 3.

MORTGAGE.

See AUCTION DUTY.

VENDOR & PURCHASER.

1. A mere deposit of deeds, even without a word, may constitute an equitable mortgage, but it can only occur, as against strangers, in cases where the possession of the title deeds

can be accounted for in no other manner, except from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and to the lands. *Bozon and Another v. Williams and Others*, 150

NEW TRIAL.

See PRACTICE, (EQUITY), 8, 15.

OFFICE.

1. The office of clerk to the deputy registrar in the Prerogative Court of *Canterbury* is not an office connected with the administration of justice, within the meaning of the statute 5 & 6 *Edw. 6*, c. 16, so as to prevent its being aliened or charged. Nor is an alienation of or charge on the profits of the office, contrary to the policy of the law, restricting the alienation of the income of a public officer. *Thomas Aston, and Philip Hurd*, plaintiffs; *Charles Gwinnell, and John Askew*, defendants. 136

OFFICER.

See OFFICE.

BANKRUPT, 4.

OVERSEER.

See ASSISTANT OVERSEER.

PAPER.

See EXTENT.

PARTNERS.

See JOINT TENANTS.

PRACTICE, (EQUITY), 6.

PAYMENT.

See CONCESSIT SOLVERE.

STATUTE OF LIMITATIONS.

PENALTY.

See ASSISTANT OVERSEER.

COAL ACT.

LANDLORD & TENANT, 1.

PLEADING.

PERFORMANCE.

See PLEADING, (LAW & REVENUE), 3.
PRACTICE, (EQUITY), 18.

PLEADING, (EQUITY).

See LANDLORD & TENANT.

PLEADING, (LAW & REVENUE).

See LIBEL.

1. In pleading a right of common by prescription, the defendant must shew a seisin in fee of the land in respect of which he claims, and prescribe in the *que* estate for the right. *The Attorney-General v. Gauntlett*, 93

2. Where a defendant justified under a right of common of pasture, by shewing a demise from a freeholder for life of the land in respect of which he claimed, and averred that he, the defendant, and all those whose estate he then had, and his landlord, from time, &c., had common of pasture in respect of the demised premises:—*Held*, upon demurrer, that the plea was bad. *Ibid.*

3. *A.*, with *B.* and *C.* his sureties, entered into a bond to *D.*, the condition of which, after reciting that *A.* was seised in tail of an estate of which he had covenanted to suffer a recovery at a future day, to enure to the use of *D.* in fee, was, that the bond should be void, if the recovery should be suffered "so and in such manner as that, under and by virtue thereof, the estate should be vested in *D.* for ever:" the recovery was duly suffered, but *A.* being seised for life only, *D.* brought an action upon the bond, to which one of the sureties pleaded, that, if *A.* had been seised in tail, the recovery was suffered so as to vest the estate in *D.* in fee:—*Held*, that this plea was bad, because, the recital in the condition did not estop *D.* from disputing that *A.* was seised in tail, nor release the surety from his

POWER.

obligation, it being the intention of the parties, that *D.* should have an estate in fee. *Edwards v. Brown, Harries, and Stephens*, 423

4. A declaration for penalties under the statute 17 *Geo. 2*, c. 3, alleged that the defendant was an assistant overseer, that a rate was duly made &c., and that the plaintiff, an inhabitant, &c., at a reasonable time, demanded an inspection of the rate, and tendered 1s.; and that, although the defendant, as such assistant overseer, had the rate in his possession, he refused to produce it; whereby, &c.:—*Held*, after verdict, that it was sufficient, because the allegation, that the defendant was an assistant overseer, could only be proved by the production of his appointment, in which his duties must be specified; and unless it had appeared, from the appointment, that he had a general authority to take care of the poor, or a limited authority to have the legal custody of the rate, the Judge would have directed the Jury to find a verdict for the defendant. *Edwards v. Bennett*, 458

POOR.

See ASSISTANT OVERSEER.
LEGACY DUTY, 5.

PORTIONIST.

See TITHES, 1.

POWER.

1. *A.* having been indebted to the estate of *B.* in a sum of money, but from which he had been discharged under a commission of bankrupt, voluntarily executed to *C.*, the widow of *B.*, a bond for the payment of part of such debt, *for the use of herself and children, but at her disposal*. Two years afterwards, *A.* executed to *C.* another bond for the payment of the remainder of such debt, *for the use and benefit of herself and children only*,

POLICY OF TRADE. 593

in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—*Held*, that the widow took a life interest in the money secured by the bonds, and that the principal, after her decease, became payable among the children, in such manner, and in such proportions, as she should direct; and the widow having made an exclusive appointment in favour of two of her children, it was held that such appointment was void, and that all the children took as tenants in common. *Fowler and Another v. Hunter and Another*, 506

2. Though, generally speaking, an instrument must be construed by the provisions contained in it, and not by any thing *dehors*, yet, under the circumstances of this case:—*Held*, that the Court might call the language of the second bond in to aid in construing the effect of the first. *Ibid.*

3. Where there is a general power of appointment among children, and the appointment from any circumstance becomes void, the children take as tenants in common. *Ibid.*

POLICY OF TRADE.

1. An agreement between three persons carrying on the trade of trunk and box makers, and travelling, by themselves and their servants, into various parts of England, to vend trunks and boxes, to divide, and not interfere with certain districts of the several cities, boroughs, towns, and villages, as set forth by them on *Bowles's Post-map of England*; and that each, during his life, by himself, and his agents duly authorized, shall travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever, by either of the other two, during their joint lives, in certain cities, boroughs, towns, and villages, and not to suffer any goods

in the said trade to be manufactured at their respective shops or warehouses, or to be sent from their respective shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of on the ground to be travelled by the other parties thereto; and not to aid or assist any person to oppose all, or any, and either of the parties; and not to purchase any tea chest or chests, black or green, at a higher price than 6d. or 8d. each in *Oxford*; and in case, at any time, during their joint lives, any person or persons shall set up and oppose any or either of the parties, to meet together, and enter into such mutual agreement, to the intent therein agreed to, as shall be beneficial to the mutual interests of the parties; it being declared to be their intentions not to do any act prejudicial to the interests of each other, but to aid and assist each other in their said trade and business, to the utmost of their power, does not operate in general restraint of trade, and, as an agreement contemplating a partial restraint only, is founded on a sufficient and valid consideration. Therefore, counts setting forth the same, and averring, by way of breaches, that the defendant travelled into the districts of the plaintiff, and sold boxes therein:—*Held* good, on general demurrer. *Wickens v. Evans*, 318

PRACTICE, (EQUITY).

See AFFIDAVIT.

ATTORNEY AND CLIENT, 1.

BANKRUPT, 9.

COSTS, 2, 5.

DEVISE, 2.

EXECUTOR & ADMINISTRATOR, 2.

POWER, 2.

VOLUNTARY AGREEMENT.

1. Bill for the conveyance of an estate, alleged by the plaintiff to have been purchased and paid for by him,

and to have been conveyed to an ancestor of the defendant, as a trustee for the plaintiff, dismissed, but without costs; there being no written agreement or declaration of trust, signed by the defendant's ancestor, and no actual evidence of the payment of the purchase-money by the plaintiff; though there was evidence of constant possession by the plaintiff, and of conversations in which the defendant's ancestor had stated that the plaintiff had purchased the property in his name, with a view of giving him a vote for the county; this evidence was, however, rather contradictory. *John Groves v. Levi Groves*, 163

2. *Semble*:—That this Court will not assist a party in getting back an estate conveyed by him for an illegal purpose; as, to enable the grantee to vote at an election, or to sit in Parliament, even though it has not been used for the illegal purpose. *Ibid.*

3. *Quære*, Whether an order to examine a witness *de bene esse* in a suit merely to perpetuate testimony, and not for relief, can regularly be obtained before answer, or without notice to the other side. *Ellis v. Sinclair*, 182

4. By the practice of the Court, the plaintiff is at liberty to refer an answer for impertinence at any time before replication. But *semble*, that for the future this is not to be understood as a general rule. *Thomas v. Jones*, 184

5. According to the practice of this Court, an answer filed at any time before the sitting of the Court, may be shewn as cause against a motion to extend the common injunction to stay trial. *Suede v. Crensdon*, 186

6. A bill was filed against two partners, for an account, and an injunction to restrain proceedings at law commenced by them against the plaintiff, and the common injunction was

obtained for want of answer. An answer having been put in, exceptions were taken, some of which were allowed. One of the partners, who was resident in *England*, filed a further answer, admitting the facts stated in the bill on which the exceptions were founded; but the other partner, being abroad, did not put in a further answer. The defendant, who had filed a further answer, moved to dissolve the injunction, on the ground that he had admitted the facts covered by the exceptions, and that, even if his answer did not bind his partner, yet the plaintiff could not obtain from the other defendant more than the same admission of the facts charged by him; which, it was insisted, did not entitle him to an injunction. The Court refused the application, the other defendant not having answered. *Prince v. Haydn and Timmins*, 190

7. Where, in taking an account of various dealings and transactions between a client and his attorney, extending over a long period of time, and the subject of protracted litigation, prolonged and increased by various appeals to the House of Lords, the Master ultimately made his general report of the balance due on the account; and, on the hearing of the cause for further directions, it appeared to the Court that the Master had made the report without reference to an exception to a separate report, which had been allowed by the Court and confirmed by the House of Lords, and without reference to certain other orders, which, it was considered, laid down a principle on which the account was to be taken; the Court, of its own accord, referred it back to the Master to review his report, having reference to such exceptions and orders. And the Master having afterwards made his report with reference to the exceptions and orders accordingly, but which was totally different

from his former report; the Court confirmed it, over-ruling exceptions. *Lewes v. Morgan*, 230

8. New trial of an issue directed in a tithe suit, it appearing that the verdict had been obtained by surprise, and against the opinion of the learned Judge who tried it, the verdict being also contrary to the opinion of the Equity Judge. *Willis v. Farrer and Others*, 264

9. An heir-at-law, questioning the sanity of his ancestor, is entitled to an issue *devisavit vel non*, and, if he fails in the issue, will not be compelled to pay costs, if the circumstances justified him in trying the issue; but costs will not be allowed to him. *Smith and Another v. Dearmer and Others*, 278

10. This Court does not direct a case for the opinion of a Court of law, as the Court of *Chancery* does, but only directs the matter to be heard before the full Court. *Gaskell v. Gaskell*, 305

11. Where, on the hearing of the cause, the Court held, that there was not sufficient evidence of the insolvency of a person within the meaning of the Bankrupt Act, 6 Geo. 4, c. 16, s. 75, so as to render void a settlement executed by him; and the plaintiff afterwards discovered further evidence of the insolvency, which, relying on the former evidence being sufficient, he did not obtain before the hearing, though he might have done so; the Court refused to grant a rehearing, the petition not being presented within six months from the date of the decree, according to the general order; the Court also considering, that the new evidence could not be received without allowing other evidence in explanation of, or contradiction to it. *Cutten v. Sanger*, 374

12. Permission given to exhibit an interrogatory after publication passed, to prove the antiquity of the hand-

writing in a book preserved in the *British Museum*. *Lord Kensington v. Pugh*, 378

13. Motion for leave to except to the Master's certificate of the taxation of costs refused. The proper course is to petition, that the Master may review his taxation. *Boxon v. Williams*, 378

14. Where, on the hearing of the cause, the suit is decreed to be dismissed, it has been the practice in this Court for the decree containing the pleadings to be drawn at full length, whilst, in *Chancery*, a short order of dismissal is usually drawn up. *Memorandum*—The practice proposed to be altered for the future. *Ibid.*

15. Motion to postpone the new trial of an issue in a tithe suit from the Summer to the Spring Assizes, on the ground, that the application for the new trial of the issue, and the decision of the Judge granting a new trial, in which he stated the verdict on the first trial to be against the opinion of himself and the learned Judge who tried it, had been published in the newspapers, and was likely to influence the Jury, especially as it was to be tried by the same Judge, refused with costs. *Willis v. Farrer*, 381

16. The common injunction to stay proceedings at law cannot be extended to stay trial after an order to amend. *Brown v. Reina*, 389

17. Interest is not allowed on a judgment, except under special circumstances, and where there is no imputation on the creditor; and, therefore, interest was refused on a judgment, where the creditor, being also mortgagee, had been in the receipt of the rents and profits of the mortgaged estates; and the propriety of his conduct was questioned with respect to the manner in which he had become such mortgagee, and with respect to his accounts, both as such

mortgagee, and also as solicitor, agent, and steward, to the mortgagor. *Lewes v. Morgan*, 394

18. Bill for the specific performance of a covenant, by which the defendants engaged, within two years, to procure the heir-at-law of *A. B.* to convey certain lands to the plaintiffs, or, within the same period, to prefer a petition to the House of Lords for, and to use their utmost endeavours to procure, an act of Parliament for substituting a trustee in the place of the heir, in case such heir could not be found, or there should not be any heir. On inquiry, no heir being found, the Court decreed the defendants to allow their names to be used in an application to Parliament for the act, expressing, however, a doubt whether such an application could succeed, the estate appearing to have escheated. *Sir John Frederick, Bart., and Others, v. Coxwell and Another*, 514

19. The Court will not decree that which seems to be impossible; and it is more than doubtful whether the old law now prevails, by which a man was compellable to procure his wife to levy a fine. *Ibid.*

PRACTICE, (LAW & REVENUE).

See ATTORNEY & CLIENT, 2, 3, 4.
COSTS, 1, 3, 4, 6.

1. The Court will not, upon an application to discharge an amercement, enter into a disputed question as to the validity of the practice of the Court of *Sewers*. *Ex parte Taylor and others*, 91

2. Where *A.* was fined by Commissioners of *Sewers* for refusing to be re-sworn upon a standing Jury, the Court discharged the fine, it being admitted that it was not usual to re-swear the Jury, except upon the issuing of a new commission. *Ibid.*

PRINCIPAL & AGENT.

3. No person can deliver a declaration by the bye in the Court of Exchequer except the original plaintiff. *Griffith and Others v. Humphreys*, 218

PRESCRIPTION.

See PLEADING, (LAW & REVENUE), 1, 2.

PRINCIPAL & AGENT.

See BANKRUPT, 4.
TURNPIKE.

1. The testamentary guardians of an infant sold part of his estates for the purpose of redeeming the land-tax, under the provisions of the act 38 Geo. 3, c. 60; by which, in cases of sales of the estates of infants for the purposes of that act, it is provided, that the purchase-moneys shall be paid into the Bank of *England*, in the manner therein directed. The purchaser of part of the property paid his purchase-money to the agent of the vendors, who was also agent to the purchaser, and the conveyance was executed. The agent did not pay the money into the bank, but misapplied it. The purchaser entered into possession, and continued in such possession for many years, paying, however, the land-tax. The heir-at-law, upon his attaining his age of twenty-one years, settled accounts with his guardians, and afterwards continued to employ the same agent, with whom he some years afterwards settled an account; and for the balance, including the purchase-money, took from such agent a security, which, however, proved valueless. Nearly twenty years after attaining his age, the heir brought an ejectment against the purchaser; to restrain which, and to obtain a confirmation of the contract, the purchaser filed his bill. The Court dismissed the

RECOGNIZANCE. 597

bill, but without costs. *Hicks v. Morant*, 286

PROMISSORY NOTES.

See BILLS & NOTES.

PROMOTIONS, 1, 307, 418, 518.

PUFFER.

See AUCTION.

PURCHASER.

See VENDOR & PURCHASER.

RATE.

See ASSISTANT OVERSEER.

REAL COMPOSITION.

See TITHES, 5, 6.

RECITAL.

See EVIDENCE, 2.

RECOGNIZANCE.

1. The condition of a recognizance, returned, filed, and enrolled as of record, cannot be varied by a rule of Court. *The King (in aid of Hollis) v. Bingham*, 101

2. Where *A.* entered into a recognizance to pay to the King a certain sum, or such sum as *B.* should award; and afterwards by rule of Court *C.* was, by consent of parties, substituted as arbitrator in lieu of *B.*, and *C.* made his award:—*Held*, that the recognizance was not forfeited by the non-performance of the award of *C.* *Ibid.*

RECTOR.

See TITHES.

REFERENCE TO MASTER.

See PRACTICE, (EQUITY), 4, 7.

598. RETAIL BREWERS.

REGISTRAR.

See OFFICE.

REHEARING.

See PRACTICE, (EQUITY), 10, 11.

REMAINDER.

See DESCENT.

RENT.

See CHAMPERTY.

LANDLORD & TENANT, 1, 3.

REPUBLICATION.

See WILL.

RESTRICTIVE INDORSEMENT.

See BILLS & NOTES.

RETAIL BREWERS.

1. A retail brewer of strong beer under the stat. 5 Geo. 4, c. 54, s. 6, whose brewery is situate in a city or market town, can retail from his brewery such strong beer only as is brewed by him upon his brewery premises. *The Attorney-General v. Overington*, 440

2. A retail brewer of strong beer, whose brewery is situate out of a city or market town, and who obtains a licence to retail strong beer in a city or market town next adjoining his brewery premises, under the stat. 5 Geo. 4, c. 54, s. 7, can retail at that place only the strong beer brewed by him at his country brewery. *Ibid.*

3. Where a brewer of strong beer, who has two breweries, the one situate out of a city or market town, and the other situate in a city, obtains a licence to retail the beer brewed at the former in the next adjoining city,

SPECIFIC PERFORMANCE.

and another licence to retail that brewed at the latter at the place where it is brewed, he cannot retail at both places the beer brewed by him at his country brewery. *Ibid.*

4. By stat. 5 Geo. 4, c. 54, s. 6, a retail brewer of strong beer, whose brewery premises are situate in a city or market town, can only retail there the strong beer there brewed by him; where, therefore, the licence of a retail brewer empowered him to retail at C. strong beer which he should have brewed and be charged with duty thereon:—*Held*, that the licence must be construed with reference to the Act of Parliament, and did not empower him to retail at C. strong beer brewed by him elsewhere. *Ibid.*

RETAINER.

See ANNUITY, 2.

REVERSAL OF JUDGMENT.

See COSTS, 6.

RULE IN SHELLEY'S CASE.

See DESCENT.

SEWERS.

See PRACTICE, (LAW & REVENUE), 1, 2.

SHERIFF.

See BANKRUPT, 4.

SOLICITOR & CLIENT.

See ATTORNEY & CLIENT.

SPECIAL BAILIFF.

See BANKRUPT, 4.

SPECIFIC PERFORMANCE.

See PRACTICE, (EQUITY), 1, 18.

PRINCIPAL & AGENT.

TITHES.

STATUTE.

See ANNUITY.

ASSISTANT OVERSEER.

ATTORNEY AND CLIENT, 2, 3, 4.

AUCTION DUTY.

BANKRUPT, 1, 2, 3, 6, 9.

CHAMPERTY.

COAL ACT.

COSTS, 3, 4.

EVIDENCE, 2.

EXTENT.

LEGACY DUTY.

LIMITATION OF ACTIONS.

OFFICE.

RETAIL BREWERS.

STATUTE OF LIMITATIONS.

VOLUNTARY AGREEMENT, 2.

WOOLMER FOREST.

STATUTE OF LIMITATIONS.

1. A verbal acknowledgment of the payment of part of a debt within six years, is not sufficient within the stat. 9 *Geo.* 4, c. 14, to take the case out of the statute of limitations. *Willis v. Newham*, 518

SUBMISSION.

See RECOGNIZANCE, 2.

TENANTS IN COMMON.

See JOINT TENANTS.

TERRIER.

See TITHES, 2.

TITHES.

1. The language of an endowment being ambiguous with respect to the tithe of hay, and being unexplained by any subsequent documents, and there being no modern evidence of usage, and no evidence of perception by the vicar, the Court declined to decree for the vicar as against a portionist claiming the tithe in question, but directed an issue. *Wyld, Clerk, v. Ward*, 192

TITHES.

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2. A single terrier, unsupported by usage, is wholly insufficient to establish a modus, though there be not only no proof of payment of tithes in kind, but uniform evidence of the non-payment of tithes in kind, within living memory. *Lynes v. Lett*, 405

3. To support a parochial modus, it is not sufficient for the defendants to prove the non-render of tithes in kind; they must distinctly shew the acceptance of the modus for some time, and to some extent. *Ibid.*

4. A party setting up an exemption from vicarial tithes for part of his farm, as being the demesne lands of a priory or monastery, the tithes of which were excepted from the endowment of the vicar, is bound to prove, that his lands actually were the demesne lands; and it is not sufficient for him to shew that the priory had a manor and lands in the parish; that, on the dissolution of monasteries, the manor and lands devolved to the Crown, by whom the same, together with the rectory, were granted to persons under whom the defendant claimed title; and that the defendant's farm was known by the name of the *Manor Grange*, which, it was insisted, meant the demesne lands: and, therefore, where a defendant set up such an exemption, but did not actually prove that his lands were the demesne, and there was evidence of the receipt for a century past of a composition for tithes for the farm in question, though alleged by the defendant to be paid for a part of the farm only, which he admitted not to be demesne lands:—The Court decreed an account, with costs. *Young, Clerk, v. Merchant*, 467

5. In a suit for tithes by the rector, the defendant set up a real composition of 10s., as covering, with other lands, the lands in his occupation. In support of that defence he

600 UNION OF ESTATES.

proved, that, in the reign of *Charles the Second*, the lands in question were divided among three persons, on a partition, and from which persons the title was regularly deduced by numerous instruments, many of which conveyed the tithes of the portions of the lands comprised in them; and, from some of them, it appeared that a money payment, parcel of a larger payment, amounting to 10*s.*, was provided for the parson, in lieu of the tithes: he also proved, that, in 1666, in an action, on the statute, for not setting out tithes, by the then rector, against an occupier of the lands, a verdict was found for the defendant. It appeared from the evidence, that tithes had been rendered prior to the reign of *Edward the Second*, but from that period no trace could be found of any tithe having ever been rendered; nor was there any evidence of the payment of the 10*s.* or any part of it: there was no reference in the pleadings, or in the evidence, to the actual deed of composition. The Court held, that there was not sufficient evidence from which a real composition could, in the present state of the law, be inferred, and decreed an account, with costs. *Lediard v. Anstie*, 548

6. It is clearly settled, that mere non-payment will not support the defence of a real composition, nor be evidence from whence to presume the deed which must have been the foundation of it. *Ibid.*

TITLE DEEDS.

See ATTORNEY AND CLIENT, 1.
MORTGAGE, 1.
VENDOR & PURCHASER.

TRADE.

See POLICY OF TRADE.

VENDOR AND PURCHASER.

TRUSTEE.

See DESCENT.

POWER.

PRINCIPAL AND AGENT.

TURNPIKE.

1. Where, upon the diversion of a turnpike road after the new road had been completed, but before the old road was stopped up, the trustees, by the permission of *B.*, broke down his fence, to make a passage from the new road to the close of *A.*, but did not put up a gate or fence to protect the latter close:—*Held*, that the trustees were wrong-doers, and that *B.* was responsible for their acts. *Winter v. Charter*, 308

UNION OF ESTATES.

See DESCENT.

USE.

See DESCENT.

FINE.

VENDOR & PURCHASER.

See AUCTION DUTY.

AUCTION.

CHAMPERTY.

PRINCIPAL & AGENT.

1. The possession of a client's deeds by his solicitor, is so usual and so much in the ordinary course of transactions, that where a person purchases an estate, and is informed that the deeds are in the hands of the solicitors of the owner of the estate, there is nothing in that circumstance which renders it necessary for him to inquire under what circumstances the solicitor holds the deeds. And, therefore, where a solicitor acquires by contract a different interest beyond what his character of solicitor confers (such as an equitable mortgage), it is incumbent on him immediately to give clear and distinct notice of such

VOLUNTARY AGREEMENT.

interest to all persons in the visible ownership of the estate. And such a case is not within the principle of the cases in which a purchaser of land has been held bound to inquire of the tenant in possession the nature of his interest. *Boxon and Another v. Williams and Others*, 150

2. The lien of a vendor upon the land, and upon the title deeds, until the purchase-money be paid to him, does not apply to a conveyance to the purchaser, executed by some but not all the parties, where the contract has gone off by the vendor's default; and if there be any lien on such conveyance, it is vested in the purchaser as a security for his deposit. *Oxenham v. Esdaile and Others*, 262

VOLUNTARY AGREEMENT.

1. The Court will not, generally speaking, enforce an agreement wholly voluntary, and without consideration. *John Groves v. Levi Groves*, 163

2. *A.* having purchased a freehold estate, and paid part of the purchase-money, died intestate, leaving two daughters, his co-heiresses and next of kin. After his decease, on payment of the remainder of the purchase-money by the two daughters and their husbands, the estate was conveyed to the two daughters as tenants in common. By an arrangement between the two daughters and their husbands, the freehold estate, and certain personal property, were agreed to be taken by *B.*, the husband of one of the daughters, (by whom the remainder of the purchase-money for the estate was recited to have been paid), as his share of the property, and a fine was covenanted to be levied to the use of *B.* in fee. The fine was neglected to be levied, but *B.* remained in possession till his death, acting as absolute owner of the estate:

WOOLMER FOREST. 601

shortly before his death, and seventeen years after the covenant to levy the fine, a deed was executed and fine levied, by which the estate was settled to the use of *B.* and his wife for their lives successively, with remainder to their children. A bill by the creditors of *B.* to set aside this settlement as voluntary and fraudulent, within the statute 13 *Eliz.* c. 5, was dismissed. *Houghton and Others v. Tate and Others*, 486

VOLUNTARY CONVEYANCE.

See FRAUDULENT AGREEMENT.
VOLUNTARY AGREEMENT.

WALES.

See CONCESSIT SOLVERE.

WARRANT.

See BANKRUPT, 7, 8.

WILL.

See DEVISE.

1. A testator by will specifically devises an estate to his wife; and, after certain bequests, he gave and devised to her all other his freehold, copyhold, and leasehold estates, not thereinbefore otherwise disposed of. By a codicil, after reciting the devises to his wife, he, in case his wife should die before him, devised all his *said* estates to trustees upon certain trusts:—*Held*, that the will was not republished by the codicil, so as to pass estates purchased between the date of the will and the codicil. *Smith and Another v. Dearmer and Another*, 278

WITNESS.

See EVIDENCE, 1.
PRACTICE, (EQUITY), 3, 12.

WOOLMER FOREST.

1. The statute 52 *Geo.* 3, c. 71, for the better cultivation of navy

timber in the forest of *Woolmer*, in the county of *Southampton*, which (s. 8,) enacts, "for the regulating and securing to the several persons now having right of common of pasture in and over the said forest, the power of cutting peat and turves within such parts of the said forest as shall not be inclosed by virtue of this Act, that, after the inclosure shall be made and completed, it shall be lawful for all persons having right of common in the said forest, to cut and take peat and turves in any part of the said forest not inclosed under this Act, without payment of any fee or sum of mo-

ney to any keeper or other person having the care or superintendence of the said forest, for taking the same," merely regulates the previous existing rights, but confers no new right, and authorizes those only who before had the right of estovers and common of pasture to cut, without payment of fees, for the necessity of the dwelling-house, in respect of which the original right existed. *The Attorney-General v. Gantlett*, 93

WRIT.

See BANKRUPT, 3, 4.

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